TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

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(25,739)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 909.

MERCHANTS EXCHANGE OF ST. LOUIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION OF JOHN T. BARKER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1917.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Missouri before you, or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit wherein the State of Missouri at the Relation of John T. Barker, Attorney-General, was Relator in a proceeding in the nature of quo warranto, and Merchants Exchange of St. Louis was Respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Respondent, Merchants Exchange of St. Louis, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the third Monday of February next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand nine hundred and Seventeen.

Issued at office in the City of Jefferson, Missouri, with the seal of the District Court of the United States for the Central Division of the Western Judicial District of Missouri, dated as aforesaid.

[Seal of the United States District Court, Central Division, Western District of Missouri.]

JOHN B. WARNER,
Clerk of said District Court,
By H. C. GEISBERG, *Deputy.*

Allowed by
W. W. GRAVES, *Judge.*

[Endorsed:] No. 18956. Filed Jan. 4, 1917. J. D. Allen, Clerk.

2 In the Supreme Court of Missouri, April Term, 1915. In Banc.

18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Be it remembered that on June 9th, 1915, the following proceedings were had and entered of record in the above entitled cause:

"Comes now the said Relator and files his information in quo warranto herein."

And thereafter, to wit: on June 14th, 1915, the following further proceedings were had and entered of record in the above entitled cause:

"Now at this day, the Court having considered and fully understood the information in quo warranto heretofore filed herein by the said relator, doth order that an order to show cause issue herein, directed to the said respondent, said writ to be returnable the 14th day of July, 1915."

And thereafter, on July 14th, 1915, the following further proceedings were had and entered of record in said cause to wit:

"Comes now the said respondent, by attorney, and files its return to the order to show cause heretofore issued herein."

And thereafter, to-wit on October 26th, 1915, the following further proceedings were had and entered of record in said cause:

"Now at this day it is ordered by the Court that this cause be continued to the April Term, 1916 of this Court."

3 And thereafter, to wit on April 8th, 1916, the following further proceedings were had and entered of record in said cause:

"Comes now the said relator and files his demurrer to the said respondent's return herein."

And thereafter, to wit, on April 21st, 1916, the following further proceedings were had and entered of record in said cause:

"Comes now the said relator, and files his amended information herein. Comes also the said respondent, by attorney, and files its amended return to the order to show cause herein, whereupon the said relator refiles his demurrer herein."

And thereafter, to wit, on April 26th, 1916, the following further proceedings were had and entered of record in said cause:

Now at this day it is ordered by the Court that said cause be set at the foot of the docket for Thursday, May 4th, 1916."

And thereafter, to wit on May 2nd, 1916, the following further proceedings were had and entered of record in said cause:

"Come now the said parties by attorneys, and upon their stipulation it is ordered by the Court that the said cause be continued to the October Term, 1916."

And thereafter, to wit, on June 13th, 1916, the following further proceedings were had and entered of record in said cause:

"Come now the said parties, by attorneys, and file their stipulation to amend the said respondent's return herein."

And thereafter, to wit, on July 3rd, 1916, the following further proceedings were had and entered of record in said cause:

"Now at this day, upon the stipulation filed by said parties, it is ordered by the Court that the said respondent be allowed to amend its return herein."

And thereafter, to wit, on October 26th, 1916, the following further proceedings were had and entered of record in said cause:

"Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court; and also file their stipulation to amend the return of the respondent to the writ herein."

4 The amended information in the case, omitting caption, is as follows:

Amended Petition in Quo Warranto.

Comes now John T. Barker, Attorney-General of the State of Missouri, who prosecutes this suit on behalf of the state, leave of court being first had, and files his amended information herein and informs the court that the respondent herein, the Merchants Exchange of St. Louis, a corporation organized under the laws of the State of Missouri, and consists of an aggregate number of persons and corporations who are engaged in the business (among other things) of buying and selling grain in the city of St. Louis, and that at all the dates hereinafter mentioned said respondent was duly organized as a corporation under and by virtue of the laws of, and authorized to transact business in this state, and that the general objects and purposes for which said respondent was chartered were to promote and extend the commercial and manufacturing interests of St. Louis and to adjust controversies and misunderstandings between the members of said exchange.

The relator further states that by virtue of the laws of the State of Missouri it is provided that public inspectors and weighers of grain shall be established at all public elevators in the State of Missouri,

in cities now containing, or that may hereafter contain, seventy-five thousand inhabitants or more, whose duties under the law are to weigh and inspect all grains received into or discharged from said public warehouse and to issue receipts therefor; that the city of St. Louis is a city of more than seventy-five thousand inhabitants, and that said public inspectors and weighers are maintained by said state at all of the public warehouses and elevators in said city as by the statute provided, and that it is made unlawful under the laws of this state for any persons, corporation, or association, other than the duly authorized State Weigher to weigh or issue any weight certificate, or to issue or sign any paper, or ticket, purporting to be the weight of any grain, weighed at any warehouse or public elevator in this state where such state weighers are stationed, and in control of the scales under the provisions of said statute, or to make any charge for such weighing or purported weighing, or weight certificate, or ticket, or purported weight certificate or tickets.

Relator further informs the court that said respondent, the Merchants Exchange of St. Louis, has been for a great many years and is now guilty of improper use and has unlawfully, illegally
5 and willfully misused and abused its corporate franchise, rights and privileges under its charter in this, to wit: In that it is now unlawfully, wrongfully and wilfully maintaining a department, known as its weighing bureau, by and through which it is now unlawfully and wrongfully in violation of the Statutes of this state weighing grain received into or discharged from public warehouses and elevators in the city of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor. That said acts of said respondent, Merchants Exchange, are usurpations of powers, rights and privileges not conferred upon it by its corporate charter and in excess thereof, and are in violation of the criminal statutes of this state, all to the great and permanent injury of the citizens of Missouri.

Wherefore, relator, prosecuting in this behalf for the State of Missouri, asks that this respondent be adjudged guilty of usurping privileges and authorities not granted by the State of Missouri in weighing the grain of the citizens of Missouri and charging therefor, and issuing weight certificates thereon, as aforesaid, and that such acts on the part of respondent be declared illegal and void and said respondent be forbidden to weigh such grain as aforesaid and charge therefor, and from issuing weight certificates thereon, and that said respondent be fined in such sum as the court thinks will punish it and cause others to refrain from doing similar acts, and for all other and further orders and relief which to the court shall seem meet, just and proper.

JOHN T. BARKER,
Attorney-General for the State of Missouri.

6 Which said Amended Return of Respondent is in words & figures as follows; to wit:

In the Supreme Court of Missouri, April Term, 1915.

Court in Banc.

STATE OF MISSOURI, on the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Respondent's Amended Return on Order to Show Cause.

Comes now the above-named Respondent, and for return to the order to show cause why judgment should not be rendered as in Relator's amended information is prayed, says:

I.

The said information does not state facts sufficient to constitute a cause of action against Respondent; nor does it state facts sufficient to warrant the relief prayed for.

7 II.

For further return Respondent admits that it is a corporation organized under the laws of the State of Missouri, and admits that its membership is made up of persons and corporations, a number of whom, but not all, are engaged in the business of buying and selling grain in the City of St. Louis.

Respondent further admits that public inspectors and weighers are maintained by the State at all of the public warehouses and elevators in the City of St. Louis.

Respondent denies that it is now, or has ever been, guilty of improper uses and acts, or either; denies that it has misused or abused its franchise, rights and privileges as a corporation, in any of the particulars mentioned in said amended petition or otherwise. Respondent admits that it does issue a certificate to its members who request the same, evidencing, among other facts, the weight of grain handled by such members, and it avers that the service it renders in connection with the weighing of grain in the St. Louis market is (*a*) to test the scales used at all elevators, public and private, and mills and other industries, (*b*) to supervise the weighing done thereon, where such service, or any part thereof, is requested by any of its members, and (*c*) to issue certificates stating the fact of such supervision and the result thereof. And Respondent says that, under the rules in force governing the Merchants Exchange and the members thereof, its Weighing Department is only required and allowed to render such service when requested by its members, and is organized for that purpose only.

Respondent denies that its testing of scales and supervising of

weights and issuing certificates showing the results of such
8 supervision, and making charges therefor, is an abuse of Respondent's corporate privileges, or constitutes a usurpation of powers, rights and privileges not conferred upon it by its charter, or in excess thereof, or that such acts are a violation of the laws of the State of Missouri, or are against public policy.

III.

Further answering said petition, respondent shows to the court that it was incorporated on January 4, 1900, as the "Merchants Exchange of St. Louis," and that the purposes specifically stated in its Articles of Association are the following:

"Article II.

"The purposes of the corporation hereby created shall not be to conduct any business whatever for pecuniary profit, but generally to advance, promote and extend the commercial and manufacturing interests of St. Louis and vicinity; to inculcate just and equitable principles of trade; to establish and maintain the utmost fairness and uniformity in commercial usages; to acquire, preserve and disseminate valuable information; and to avoid and amicably adjust, as far as practicable, any controversies or misunderstandings arising between individuals engaged in trade; and finally and particularly, to facilitate in every proper way the transaction of all legitimate business between members or between them and others." (Articles of Association, p. 3.)

For the furtherance of these purposes, respondent is authorized by the third of its Articles of Association to make and adopt all needful rules, regulations and by-laws. Respondent says that it has a membership, resident and non-resident, of about twelve hundred, of whom
over seven hundred are handlers of and dealers in grain on
9 the floor of the Exchange; that in order to effect the purposes of the organization, and with a view to avoid and adjust as far as practicable the controversies and misunderstandings which are apt to arise in trade when parties have no acknowledged rules to guide them, the members adopted, and agreed to be governed by certain Rules and Regulations, and that among these Rules was the following:

"The Board of Directors is fully authorized and empowered to establish and maintain a Department of Weights under such rules, regulations and conditions as the Board may deem necessary and proper; the purpose and intent being to secure the accurate and correct weighing and method of weighing of all property handled by members of the Merchants' Exchange and others requesting the service." (See Rule IV, Section 10, page 15.)

And respondent says that, in pursuance of said rule, the said Exchange did, about the year 1901, establish and has ever since main-

tained a Department of Weights, which is governed by Regulations adopted by the Board of Directors, which Regulations are as follows:

"Regulations for the Government and Conduct of the Department of Weights.

Adopted by the Board of Directors.

Regulation I.

It shall be the business of the Department of Weights to weigh or supervise the weighing of commodities handled in this market by members of the Merchants Exchange. Where proper weighing facilities are provided in elevators, mills, warehouses and at team tracks, all hay, grain and feed sold by members of the Merchants Exchange and unloaded at points where supervision is maintained, shall be weighed under the supervision of the Department of Weights, except such as may be bought to arrive on basis of shippers' weights.

(*a*) The fee hereinafter provided for supervision of weights shall apply only at places where Merchants Exchange supervisors are maintained. When supervision is requested at places other than these, the charge shall be fixed by the Department of Weights upon a reasonable estimate of the cost.

(*b*) All fees provided for in this regulation shall be paid by the seller, except as provided for in Paragraph 5, Section 6, of Rule VIII, but may be collected by the Department of Weights through such agencies as may be deemed most expedient.

(*c*) Any fees for supervision which may be paid by any member of this Exchange, as consignee of the grain against which said fees may have been assessed, shall be deemed a legitimate expense incurred in caring for and protecting the property of the consignor and shall be charged by the consignee to the consignor.

Regulation II.

The weighing of grain loaded out of mills, elevators or warehouses shall not be supervised by the Department of Weights except when requested, and in such case the fee shall be paid by the party requesting the service.

Regulation III.

The fees for supervision of weighing shall be as follows:

On grain unloaded at mills, elevators or warehouses, a minimum of thirty-five (35) cents per car.

On grain loaded out of mills, elevators or warehouses, in St. Louis, Mo., a minimum of ten (10) cents per car, and when loaded into barges ten (10) cents per thousand bushels.

On grain loaded out of mills, elevators or warehouses at East St. Louis, Ill., and at places contiguous thereto, a minimum of twenty-

five (25) cents per car, and when loaded into barges twenty-five (25) cents per thousand bushels.

On grain unloaded from barges, thirty-five (35) cents per thousand bushels.

11 On sacked grain unloaded from boats or cars the fee shall be one-quarter (¼) cent per sack.

At breweries and malt houses, one dollar ($1.00) per car.

At all elevators, mills, warehouses to which supervisors are sent by request, the fee charged shall be on a basis of thirty-five (35) cents per hour and railroad fare and expense outside the city limits of East St. Louis, Venice, Madison, Granite City and St. Louis, one dollar ($1.00) to be paid by the seller and the balance paid by the buyer.

On grain sacked and loaded out of elevators the fee shall be twenty-five (25) cents per car.

At all other points the fee shall be based upon a reasonable estimate of the cost.

When considered necessary for the best interests of the trade, the Department of Weights may enter into an agreement with the operators of mills, elevators and warehouses or other industries to assign a supervisor from the Department to weigh or supervise the weighing and require the operators of such mills, elevators, warehouses or other industries to guarantee to the Department a sum sufficient to defray the cost of the service rendered."

Paragraph 5 of Section 6 of Rule VIII, referred to in the above Regulation I (*b*), is as follows:

"On all grain, hay, straw or mill feed sold for unloading at St. Louis or East St. Louis, the cost of weighing shall be paid by the seller, provided such cost does not exceed one dollar per car; any cost in excess of one dollar per car to be borne by the buyer."

And respondent herewith files, as a part of this return, a printed copy of the Articles of Association, Rules, By-Laws and Regulations, adopted and in force and governing the members of respondent, the same being marked Exhibit A.

12 **IV.**

Respondent states that similar Departments of Weights are maintained by the Boards of Trade of Chicago, Kansas City, Cincinnati, Baltimore, Buffalo, Memphis, Cairo, New Orleans, Nashville, Detroit, Milwaukee, Peoria and other places where Boards of Trade exist, on or through which Boards of Trade grain is handled, and that all trades made between members of the Exchange of St. Louis with each other, or with members of other Exchanges, covering the buying and selling of grain, are made, except where otherwise specifically stated in the contract of sale, on the basis of Exchange weights, and that all accounts sales rendered by the members of respondent to shippers for whom such grain is handled, which said accounts show the grade, weight, switching expense and inspection, are accompanied by the certificates of the Weighing Department of respondent. And respondent shows to the court that practically all of the business done by members of the Exchange is done not with individual farmers who

raise the grain, but with grain dealers or shippers throughout the country, who purchase the grain from the farmers and pay for it as it is delivered either into local country elevators or to track buyers, and that respondent's Weighing Department is maintained and operated only so far as its members desire to avail themselves of its services.

Respondent admits that it has established a Weighing Department, and that it has for a number of years past supervised the weighing of grain received in and shipped from the St. Louis market, as said market is described in this return, and says that the system of supervision which it has thus established has become vital to the commercial transactions of said market, increasing the grain
13 trade therein, and increasing the reputation of said market for correct weighing and fair dealing over a wide section of country, inclusive of all sources of grain shipments to said market in Missouri and in the surrounding states. Respondent further admits that it is its rule and its uniform custom to give out to parties entitled thereto certificates of weight, which certificates, it avers, by reason of their uniform accuracy, have established the reputation of said market throughout a wide area, and have proved of great value to the raisers of grain, to grain dealers, and to others shipping to said market. And respondent states that the prevention and stoppage of such weighing and of the issuing of such certificates would incalculably injure the reputation of said market, and would lower its reputation for, and standard of, fair dealing; that the weighing, and the issuing of certificates of weight, are demanded by the trade in and coming to said St. Louis market, while the carrying into effect of the prohibitory and punitive provisions of the Grain Inspection Act of Missouri, striking down and penalizing respondent's voluntary system of weighing and certifying weights, if enforced as is sought by the present proceeding, or as they might be enforced by criminal prosecutions under said Act, will injure the grain trade in said market and in Missouri, and will result in large pecuniary loss to those engaged in business in said market and throughout the State. And respondent says that dealers in and shippers of grain to said market have for many years past supported said Weighing Department, and have willingly paid the said inspection and weighing charges, and have also voluntarily paid for certificates of weight by respondent's Weighing Department, and said dealers, shippers and others are entitled to the additional assurance of respondent's certificates of weight, for which they are willing to pay. Respond-
14 ent says that it is for the general interest of those handling grain that the accuracy and fair dealing of this market should be fully established, and to this end the small additional charge collected by respondent is most willingly paid, it being generally recognized by those engaged in the grain business that a double inspection and weighing, and a double certification of grades and weights, so far from harming any one, add to the general security, the one inspection and weighing necessarily confirming or correcting the result of the other, and are thus for the benefit of the farmer, of the dealer and of the consumer.

And respondent further shows to the court that its Weighing Department tests the scales and supervises the weights at some sixty different public and private elevators, flour and feed mills and other industries using grain, all located in the territory known as the St. Louis market, and which includes points in East St. Louis and other adjacent places in Illinois, and that of all these sixty elevators, mills, etc., at which its service is maintained, but six are Public Elevators, located in the City of St. Louis, where the State Weigh-masters supervise the weighing of grain jointly with the agents of this respondent, to-wit: the Burlington Elevator, the Central Elevator B, the Exchange Elevator, the Mississippi Valley Elevator, the Rogers Elevator and the Mound City Elevator.

And respondent shows to the court that since the year 1901, when its Weighing Department was organized, with the exception of one year, to-wit: the year 1913, when a surplus of $396.05 was shown from the operations of said Department, the said Department has been operated at a pecuniary loss to respondent of from one thousand dollars ($1,000.00) to over eleven thousand dollars ($11,000.00) a year, or at a total loss down to the end of the year 1914 of $85,501.01,
15 which its members cheerfully share because of the general benefits to the St. Louis market believed to redound therefrom; that it employs in said Department from forty-two to forty-seven men, specially trained for the work of the Department; that the grain buying and selling forms the largest part of the business done on the floor of its Exchange; that the standing of the Merchants Exchange of St. Louis among the Exchanges and Boards of Trade throughout the United States is most excellent, and that such excellent standing is to a great degree owing to the standard of efficiency with which the business of its said Department of Weights is maintained and operated; that the service rendered by the Department includes many things other than supervising weights, and includes car inspection record, giving a pen picture of every car of grain shipped into the St. Louis market, with a diagram showing points of leakage and general condition of car, which is kept as a permanent record; includes the elaborate testing of hopper, dormant and track scales, and scales in use at public and private elevators; the rigid supervision of weighing and whatever pertains thereto in and out of all elevators, mills, etc.; the sealing of cars and the recording of such seals, and the dissemination of information in circular letters to upwards of four thousand shippers in Missouri and States tributary to the St. Louis market, relative to the best methods for handling and shipping grain crops. Respondent shows to the court that the gross cost to it of operating its said Department of Weights is from forty to forty-three thousand dollars per annum, and that it makes a charge of from thirty-five to fifty cents for its certificates, whenever its service is availed of, a matter which is entirely optional. And respondent says that it is essential to its maintenance as an Exchange, and essential to enable its members to transact business with the members of other Exchanges throughout the country, that the said
Department of Weights be maintained and operated, and that
16 unless it had the right to make a charge for such services, it would be unable to maintain said department, respondent's

records showing that, of the grain handled in said St. Louis market, amounting to about eighty million bushels a year, 11,722 car loads were unloaded at private elevators, mills and other industries in the year 1913, while only 10,298 cars were unloaded at public elevators during that year.

While respondent denies that its action in weighing grain and making a charge therefor, and in issuing receipts or other evidence showing such weights, is an abuse of the corporate privileges of respondent, or is against the laws of the State of Missouri or against public policy, respondent charges that the Act in question is, in itself, opposed to the public policy of Missouri, in that it bestows upon certain individuals, to be designated by the Warehouse Commissioner, a monopoly of inspecting and weighing grain, and in giving certificates of grades and weight, and a monopoly of receiving compensation therefor. And respondent denies each and every allegation of said petition not in this return specifically admitted.

V.

And respondent for further return says that so much of the statute of Missouri in relation to the inspection and weighing of grain, as said statute is amended by the Act of March 23, 1915, as makes it unlawful for any person or corporation other than a State weigher to weigh grain and issue a certificate therefor, and to make a charge for such services, is null and void under the Federal Constitution and under the Constitution of Missouri, for the following reasons:

(*a*) Because it violates the third article of the Missouri
17 Constitution which divides the powers of government into three departments, legislative, executive and judicial, and provides that no person or collection of persons charged with the exercise of powers properly belonging to one of those departments shall exercise any power properly belonging to either of the others; and, further, because it violates the first section of the fourth article of said Constitution, which provides that the legislative power shall be vested in the general assembly of the State, while such legislative power is by said statute delegated to the Warehouse Commissioner, as appears from the following provisions. Section 8 of the Act of March 20, 1913, as amended by the Act of March 23, 1915, defines what are public warehouses, and confines such warehouses to the three cities of St. Louis, Kansas City and St. Joseph. But the act as a whole, including the amendment, does not confine to these three cities the establishment of grain inspection and grain weighing. For Section 44 of the Act of 1913 is still in force, and that section provides that the inspection and grading of grain, not only going into and coming out of public warehouses, but also all grain "whether into or out of warehouses, elevators, or in cars, barges, wagons or sacks arriving at or shipped from points where state grain inspection is established," must be performed by persons appointed by the Commissioner; and Section 62 of the Act of 1913, which is also still in force, requires all railroads at all terminal or other points within this State wherever State grain inspection may be established, to provide,

on the Commissioner's order, suitable wagon scales in their unloading yards upon which grain may be weighed as required by the said Act. Sections 59 and 60 also confer upon the Commissioner power to appoint weighmasters, and fix their fees, not only at public warehouses, but also "at such places within this State where State grain inspection and weighing may be established in conformity
18 with the provisions of" said Act. And upon the persons so appointed by the Commissioner is devolved the duty to weigh all grain "contained in each car, wagon or other package." And Sections 60-62 make it clear that the above language is intended to include "grain not going into warehouses or elevators," and therefore not coming within the purview of Section 8 of the Act, as amended in 1915. So that the Warehouse Commissioner is given by said Act discretionary power to establish State grain inspection, and to make the provisions of the Act apply, at any railroad station in the State, whether such station be within or without the limits of the three cities herein named, and he is, therefore, vested with legislative power.

(*b*) That those Sections of the said Act which make it unlawful for any person, who has not been appointed by the Warehouse Commissioner, to act as an inspector of grain, and which confine the inspection of grain to persons who have been appointed by said Commissioner, as also those Sections which make it unlawful for any person other than a State weigher to supervise the weighing of grain, or to issue any weight certificate, or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain weighed at any warehouse or elevator where duly appointed and qualified State weighers are stationed, or to make any charge for such weighing or weight certificates, has the effect to deny to the members of respondent as individuals, or by associated action, the right to make contracts and to engage in private business, and is therefore in violation of Section 4 of Article 2, of the Constitution of Missouri, which declares that "all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry," and of Section 30 of Article 2 of the Constitution of Missouri, and of the first Section of the 14th Amendment to the Federal
19 Constitution, in that they deprive such persons and such members of their liberty and property without due process of law, and deny them the equal protection of the laws.

And respondent shows to the court that while the said Act, in terms, makes the certificate of the Weighmaster only prima facie the basis of settlement between buyer and seller, it in effect, by prohibiting others from weighing such grain, and certifying the same, would make such certificate conclusive, since the statute forbids, under a heavy penalty, any one to take the necessary steps to show that the certificate is false. Therefore, for this additional reason the Act on which this information is based deprives the members of respondent of their property without due process of law, in violation of Section 30 of Article II of the Missouri Constitution and of Section 1 of the 14th Amendment to the Constitution of the United States.

(*c*) Respondent says further that the Act of 1913, as amended

by the Act of 1915, is not a police measure, nor is it constitutional because within the police powers of the legislature, on the ground that it is needful, and that its purpose and effect is to promote either the safety, health or welfare of the people, for it has no tendency to promote either, since no one engaged in the business of raising grain or of dealing in grain can be in any way injured by duplicating the inspection and weighing of such grain, nor by the duplicating of certificates of grades and weights, but, on the contrary, any one so engaged will have the additional security arising from a double inspection, and a double supervision of the weighing of such grain.

(*d*) Said Act further infringes Section 30 of Article II of the Missouri Constitution and Section 1 of the 14th Amendment to the Federal Constitution, by reason of the fact that it denies to respondent the right to serve, through its appointed agents, as a Check Weighman, as it were, to the State to give greater confidence to the outside world in the reliability of St. Louis market weights, which is considered a matter of such vital importance to the reputation of St. Louis merchants for fair dealing that, though approximately half of the members of respondent have no direct connection with the grain business, as such, they cheerfully bear their share of the annual deficit in conducting the Weighing Department of respondent.

(*e*) Respondent further shows to the court that a large part of the grain which is inspected and weighed by the Weighing Department of respondent is grain which is shipped through St. Louis from some point in the State of Missouri destined to some point in some State other than Missouri, or is shipped from some point outside of Missouri to St. Louis or some other point in Missouri, or is shipped from some point outside of Missouri to some other point outside of Missouri, but passing through St. Louis en route, a large proportion of which is passed through public elevators in the City of St. Louis for the purpose, and only for the purpose, of transferring the grain from one car to another and in order to get official Merchants Exchange Weights. All interstate grain herein referred to in the regular course of business and as part of its interstate transit, is received into elevators at St. Louis and East St. Louis, where it is made the subject of transfer in transit and elevation. It is commercially necessary to pass such grain through an elevator where it is elevated and weighed. Elevation consists of the unloading of grain from cars or vessels into elevators and the reloading of the grain out into other cars or other vessels. Elevation is indispensable to weighing in the elevator. Such weighing is the natural, usual and only practicable method of handling the grain. The act of so weighing and of so elevating each is a necessary step in transportation. Such elevation and such weighing each is and has for years been, under the existing conditions and methods of transportation in and through St. Louis, an indispensable means of the transfer in transit of grain from the cars or vessels of one carrier to those of another. There is neither time nor space nor labor for the shovel or any other method of transfer or for weighing in the car or for any other method of weighing. Such weighing is a necessary service in connection with the

elevation and the transfer in transit of grain and is a necessary instrumentality and facility in the interstate shipment and carriage of grain. Furthermore, by reason of the fact that St. Louis is on the Mississippi River, the boundary between Illinois and Missouri, much of the grain coming to said market is stored in elevators in Illinois, and the Weighing Department of respondent operates not only in Missouri but also east of the Mississippi River at East St. Louis, Madison, Alton and other points in the State of Illinois. All such grain is, therefore, a part of the interstate traffic passing in the course of transportation to or through the St. Louis market, which embraces territory and warehouses on both sides of the Mississippi River, as is hereinbefore shown. In interstate shipments of grain the certification of weights and of grades by respondent is essential to the
21 protection of all parties transacting grain business in said market, and the denial of the right to persons other than state inspectors and weighers, directly, and not incidentally or remotely, affects interstate commerce. And for these reasons the Grain Inspection Act of Missouri infringes Section Eight of Article One of the Constitution of the United States, under and by virtue of which Section the power to regulate commerce with foreign nations and among the several States is conferred exclusively upon the Congress of the United States.

Wherefore, respondent says that the relator is not entitled to the writ prayed for in his petition and respondent asks to go hence without day.

PERCY WERNER,
Attorney for Respondent.

22 Relator demurred to said return, which said demurrer, omitting caption, is as follows:

Reply.

Now at this date comes the relator and demurs to the return of the respondent and moves for a judgment for the following reasons:

First. Because said return is argumentative and does not take issue with the original petition.

Second. Because said return constitutes no defense.

Third. Because if the allegations in said return are true, and on which subject relator has no information, relator is still entitled to the relief asked for in the original petition.

Fourth. Because none of the allegations in said return constitute any defense to relator's cause of action.

Wherefore relator prays for judgment as in the original petition.

JOHN T. BARKER,
Attorney-General.

23 In the Supreme Court of Missouri, October Term, 1916.

In Banc.

18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Stipulation.

It is hereby stipulated and agreed between the Relator and the Respondent herein that Respondent's return may be amended by interlining, at the end of the second line at the top of page 14 of said Return, the following words: "and deny them the equal protection of the laws."

LEE B. EWING,
Attorney General, for Relator.
PERCY WERNER,
Attorney for Respondent.

23*a* In the Supreme Court of Missouri, October Term, 1916.

In Banc.

No. 18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

It is hereby stipulated, by and between the parties hereto, that, with the consent of the Court, Respondent's Return to Relator's Amended Information be amended by the incorporation in paragraph (*e*) of Section V of said Return, between the word "Weights", at the end of line thirteen, and the word "Furthermore", at the beginning of line fourteen, as they appear on page 15 of the said printed Return, to wit:

"All the interstate grain herein referred to in the regular course of business and as part of its interstate transit, is received into elevators at St. Louis and East St. Louis, where it is made the subject of transfer in transit and elevation. It is commercially necessary to pass such grain through an elevator where it is elevated and weighed.

Elevation consists of the unloading of grain from cars or vessels into elevators and the reloading of the grain out into other cars or other vessels. Elevation is indispensable to weighing in the elevator. Such weighing is the natural, usual and only practicable method of handling the grain. The act of so weighing and of so elevating each is a necessary step in transportation. Such elevation and such weighing each is and has for years been, under the existing conditions and methods for transportation in and through St. Louis, an indispensable means of the transfer in transit of grain from the cars or vessels of one carrier to those of another. There is neither time nor
23*b* space nor labor for the shovel or any other method of transfer or for weighing in the car or for any other method of weighing. Such weighing is a necessary service in connection with the elevation and the transfer in transit of grain and is a necessary instrumentality and facility in the interstate shipment and carriage of grain.

JOHN T. BARKER,
Attorney for Relator.
PERCY WERNER,
Attorney for Respondent.

24 And thereafter, to wit on December 21st, 1916, the following further proceedings were had and entered of record in said cause:

(#18956.)

"STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Comes now the relator, who prosecutes in this behalf for the State of Missouri, and comes also the said respondent, by its attorney; and the Court having fully considered the information, the amended return thereto, the relator's demurrer to said amended return, and being fully advised in the premises, doth find the respondent guilty of unlawfully, wrongfully and wilfully maintaining a department known as a weighing bureau, and, by and through such weighing bureau, of unlawfully and wrongfully, and in violation of the statutes of this State, weighing grain received into or discharged from public warehouses and elevators in the City of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor, whereby it has abused and misused the *the* authority, franchises and privileges conferred upon it, as a corporation, by the laws of this State. It is therefore considered, ordered and adjudged by the Court that the said respondent be, and is hereby, ousted of its usurped power of weighing grain received into or discharged from public warehouses and elevators in the City of St. Louis, and making charges therefor, and issuing weight certificates or

tickets and making charges therefor. It is further considered and adjudged by the Court that the State of Missouri have and recover of and from the said respondent its costs herein paid out and expended, and that execution issue therefor. (Opinion filed.)"

Which said opinion is in words and figures as follows:

25 In the Supreme Court of Missouri, October Term, 1916.

En Banc.

No. 18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

This is an original proceeding in quo warranto, at the instance of the Attorney General. The information, after formal allegations as to the incorporation of respondent, and as to certain laws of this state with reference to public inspectors and weighers of grain at all public elevators in cities having 75,000 inhabitants, charges:

"Relator further informs the court that said respondent, the Merchants Exchange of St. Louis, has been for a great many years and is now guilty of improper uses and has unlawfully, illegally and willfully misused and abused its corporate franchise, rights and privileges under its charter in this, to wit: In that it is now unlawfully, wrongfully and wilfully maintaining a department, known as its weighing bureau, by and through which it is now unlawfully and wrongfully in violation of the Statutes of this state weighing grain received into or discharged from public warehouses and elevators in the city of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor. That said acts of said respondent, Merchants Exchange, are usurpations of powers, rights and privileges not conferred upon it by its corporate charter and in excess thereof, and are in violation of the criminal statutes of this state, all to the great and permanent injury of the citizens of Missouri.

26 Wherefore, relator, prosecuting in this behalf for the state of Missouri, asks that this respondent be adjudged guilty of usurping privileges and authorities not granted by the State of Missouri in weighing the grain of the citizens of Missouri and charging therefor, and issuing weight certificates thereon, as aforesaid, and that such acts on the part of respondents be declared illegal and void and said respondent be forbidden to weigh such grain as aforesaid and charge therefor, and from issuing weight certificates thereon, and that said respondent be fined in such sum as the court thinks will punish it and cause others to refrain from doing similar acts, and

for all other and further orders and relief which to the court seem meet, just and proper."

The return is exceedingly verbose, and such portions thereof as may be required can best be noted in the opinion, in connection with points raised. This return runs the gamut from a general demurrer to the invocation of the 14th amendment of the Federal constitution. Relator challenges the sufficiency of the return and moves for judgment on the pleadings. The facts, in the return, where facts may be in dispute as between the petition and return, must be taken as the facts in the case. This sufficiently outlines the case.

I.

This case requires (1) a const ıction of our statutes, and (2) a determination of their validity. There are two vital questions met at the very threshold of the case. Section 63 of the act of 1913, reads:

"It shall be unlawful for any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other packages of
27 grain weighed at any ware-house or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment."

By the return it is admitted that the respondent has a weighing department, and that such department weighs the grain coming into public elevators and warehouses in the city of St. Louis, and further that it issues certificates of weight to the parties entitled thereto, and makes charges therefor.

With the plain letter of the law before us, and the admissions of respondent before us, it would be idle work to go into a detailed discussion of the question as to whether or not respondent is or is not violating this state statute. Its admissions of record shows that it is not only violating the spirit, but also the letter of the statute. Its reasons for such violation are immaterial, if the statute is a valid enactment. Much of the very lengthy return is taken up with statements of reasons for the admitted violation of the law, but if the law is a valid one, the imagined necessity of its violation in the alleged interest of the grain trade at St. Louis, is wholly immaterial, and beyond the real issues.

Many laws seemingly work hardships upon persons and their busi-

ness, but this is no excuse for the violation of the law. Nor is this seeming hardship an excuse for a corporation to do things, under a charter granted by the state, which things the state has
28 forbidden by law.

The crux of this case lies in the validity or invalidity of our inspection laws. It does not lie in extraneous facts which might tend to show that the business of buying and selling grain in St. Louis would be benefited by a weighing and inspection thereof by respondent, rather than one by the state. To this vital question we proceed next.

29 II.

We shall not discuss the fundamentals in statutory construction, when validity of a statute is at stake. It goes without the saying that there is a legal presumption of validity; that if there is doubt as to the constitutionality of the law the doubt shall be resolved in favor of the validity of the legislative act; that the expediency or inexpediency of the act is not for the courts; that in Missouri the power of the legislature to enact laws has no limitation, except the express limitations in the state and Federal constitutions; that the legislative power under the police powers of the state are very broad.

Of all the members of this court the writer has been most loth to extend the police powers of the state. Vide concurring opinion in State vs. Railroad 242 M. l. c. 376 and dissenting opinion in State ex rel. vs. Vandiver, 222 M. l. c. 255. Yet in all that I may have written, the doctrine that private rights may be made subservient to the public welfare is thoroughly recognized. The respondent urges that its private rights are invaded by these statutes, and if so, then the laws are invalid, unless they fall within the practically undefined field of police powers of the state. I say undefined, because the field of the public peace, health, safety and welfare, is a very broad one, and there are many angles from which to view the field. Laws of the character of the ones here involved, where sustained, have been sustained upon the theory of police regulations. In other words, because they were a proper exercise of the police power of the state. We shall not attempt to defend these laws otherwise.

To determine whether or not these grain inspection laws, including the weight and certificate provisions thereof, are a proper exercise of the police powers, we should have the provisions thereof clearly in mind, and then say whether or not such provisions tend toward the general welfare.

30 The act defines a public warehouse-man and elevator-man, and public warehouses and elevators, and establishes the office of Warehouse Commissioner. It further provides for the grading and weighing of all grain into the public warehouses or elevators, and for the keeping of such grain in the grades so established. Expert grain inspectors are to be employed to grade the grain, and weighmen employed to weigh the grain into the warehouses and elevators. If controversy arises either as to weights or grades a disinterested committee settles the same.

These officers are bonded for the faithful performance of duty. Warehouse receipts can only be given for grain actually weighed into the warehouse according to the grading and weighing of these public officers, and such receipts must be registered in the department of the Warehouse Commissioners. These receipts must be numbered consecutively and no two receipts from one warehouse shall be of the same number during the space of any one year. When grain is delivered upon a receipt, the receipt must be given over to the proper officer of the state for cancellation. The issuance of receipts without the grain is made a crime. In fact the act undertakes to so hedge in the handling of grain in these public warehouses and elevators, as to prevent all kinds of frauds. It so hedges the warehouse receipts that frauds upon banks and other persons loaning money are protected. The whole purport of the act is for such official supervision in the principal grain markets as will protect not only the buyers, but the sellers of grain. In other words it establishes a disinterested agency between the buyer and seller both as to weights and grades of the grain. If a wheat grower of Missouri ships a car of wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators) but he has the protection of the disinterested agency established by the state, an agency duly bonded for faithful performance of duty. If a Missouri miller desires to purchase a car of grain he has the same protection. If after grain is stored in an elevator, a Missouri banker desires to loan money upon the property, he has the assurance that it has been fairly graded and weighed, and the further assurance that not only is the grain there, and of the quality stated, but that only one elevator receipt is out for that particular grain. To say that these laws do not tend to the public welfare would be a travesty upon the law. Thirty-five states of the union have laws similar to these laws, although they may affect different commodities. Many of them are gray from age. Such laws are usually directed to the chief commodities of the different states. In one it may be coal, whilst in others it is cotton, lumber, tobacco or some leading product. Section 6868 R. S. 1909 reads:

31

"If any person other than the inspector shall inspect any hogshead of tobacco within the city of St. Louis, or if any person occupying any store or warehouse within the city of St. Louis shall suffer or permit any person other than the inspector to inspect any hogshead of tobacco upon the premises occupied by him, such person inspecting the tobacco, and such person or persons suffering and permitting such illegal inspection, shall each be fined in the sum of one hundred dollars for every hogshead of tobacco so inspected to the use of the state, to be recovered by indictment."

This statute, which is a part of the tobacco inspection laws of this state, has remained upon our books from 1845 to now. For over 70 years it, like a great oak of the forest, has stood unchallenged and unharmed. Similar statutes in other states date back to colonial times. The purpose of all is the general welfare.

Nor are we scant in authority upholding such police regulations.

In Coal Company vs. City of St. Louis, 130 M. l. c. 327 we had this ordinance under review:

"No person shall buy or sell any hay or stone coal in this city until the same has been weighed by one of the legally authorized weighers, and a certificate of the weight thereof given, as required in the
32 provisions of this article; and any person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than $10.00 for each offense."

The ordinance was upheld by this court in an able opinion by Brace, P. J. The ordinance it was held was within the charter powers, but it must be noted that such charter powers have their origin in the police powers of the state. In this case Brace, P. J. said:

"By the charter of the city of St. Louis, the mayor and assembly have power by ordinance "to license, tax, and regulate retailers," "to regulate and establish the standard of weights and measures to be used in the city of St. Louis, and to provide for the inspection of the same," "and for the inspection and weighing or measuring hay or stone-coal, charcoal, firewood, and all other kinds of fuel to be used in the city of St. Louis." Scheme & Charter, art. 3, sec. 26, pp. 2097 and 2098, 2 R. S. 1889.

The plaintiffs as retailers of coal by the wagon load in said city are amenable to all ordinances of the city within the scope of the powers thus granted." "The purpose of the ordinance is plain. It is to protect the citizen from being imposed upon by false weights and measures. To accomplish this purpose, while dealers in coal may weigh the coal which they sell on their own scales, they are not permitted to sell a wagon load of coal that has not been weighed by a weigher approved by the mayor and authorized by law to weigh the same. That it may be weighed by such a weigher and no other, and the citizen have the assurance of the fact, weighers' certificates of that fact are "furnished" to such dealers for such weighers, and such weighers are required to "furnish" one of such certificates for each load weighed by him. Surely nothing can be found in the purpose of this municipal law, nor in the means by which it is sought to be accomplished, that is without the express power granted by the charter to the city to regulate the weighing of coal in the city, and the
33 fact that a few cents are charged by the city for furnishing each of the certificates surely can not be beyond the power expressly given to tax and regulate "retailers" of that commodity. Whether the mayor and assembly have selected the best means, by these ordinances, to accomplish the purpose, is a matter with which we have nothing to do. The power exercised being within powers granted by the charter, the plaintiffs have no cause of action. The demurrer was properly sustained, and the judgment is affirmed."

In the city of St. Charles vs. Elsner, 155 M. 671, we had up a very similar ordinance. It covers however coal, hay and corn, and it required both the weighing of such commodities, and an official certificate of weights. This ordinance we upheld.

In Ex parte House vs. Mayes, 227 M. l. c. 636, Gantt, J. said:

"That the inspection and regulation of weights and measures are

within the police power of the States, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto, and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulations and not repugnant to the Constitution of the United States or of this State can no longer be doubted. (Pittsburg Coal Company v. Louisiana, 156 U. S. 590; 30 Am. and Eng. Ency. Law (2 Ed.), 451 and cases therein cited.) Legislation along these lines is found in almost every country, the underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective and uncertain weights and measures and fraudulent practices connected therewith."

I thought the statute involved in the House case entrenched upon private contracts, and dissented with all the vigor I possessed, but only succeeded in getting two of my brothers to see the light as I saw it. The case went to the U. S. Supreme Court, and if I recollect aright my dissent had less effect there. Authorities from other jurisdictions are along the same lines. The purpose of state weighers is to get fair weights for all parties concerned. The purpose of certificates of weights being filed with the warehouse commissioners' department is clearly apparent from the outline of the law which we have given. Such requirement protects the public from more than one angle. We have no doubt that under our rulings, to some of which we have not agreed, these statutes are valid.

34

III.

We are cited to language used by Valliant J. in State ex. inf. vs. Coffee et al. 192 M. l. c. 679 and 680. The language there used must be interpreted in accord with the facts of the case, and the law there under consideration. On page 679 that distinguished jurist did say:

"If all that the Attorney-General claims as the official rights of the State weighmasters be conceded, it is still doubtful if quo warranto is the proper remedy. The members of the Board of Trade have a right on their own account to employ men to weigh their grain for them and to accept their certificates of weight, even if it is the duty of the State weighmasters also to weigh the same grain and to give certificates of the weights. And if the law gives to the certificates of the State weighmaster a legal effect as evidence, still if the person buying or selling the grain should prefer to have it weighed by some other person and to base his business transaction in reference to it on the unofficial rather than the official certificates, he would have a right to do so. Such a course would not prevent the State weighmaster from performing his official duty or deprive him of his fees."

But it must be recollected that the statutes there under discussion had no such provisions as we have in section 63 of the act of 1913, supra. He did however in the concluding portion of his opinion (192 M. pp. 688-689) get to the meat of the instant case. He there said:

"The amendatory act of March 9, 1893, which we are now
35 considering does not purport to alter or amend any section of the law as it theretofore existed in reference to State grain inspection; it only adds other sections providing for weighing the grain that by law theretofore existing was subject to inspection.

It may be that the General Assembly, if it had then understood that grain inspection was by the law, as it then was, limited to public warehouse grain, would have so amended that law as to include other grain, but that is mere conjecture; we only know that, whether from misapprehension or disinclination, the General Assembly did not so amend this law, and we must take the law as we find it.

We have no doubt of the constitutional authority of the General Assembly in the exercise of the State's police power to throw around persons who ship their grain to market in this State the protection that official inspection and official weighing can give. Without such protection the shipper is at the mercy of those who handle his grain in the great markets, and in the ordinary course of business he has no means, or at least no convenient or adequate means, of verifying the classification and weight of his grain. It is no infringement of the shipper's constitutional rights to tax his grain with reasonable charge for this official service, because whether a particular individual desires to avail himself of the service or not, such service is a wholesome control over the conduct of the business, and the State has the right to interfere for the protection of the public. And besides, there is nothing that could make the markets of this State more attractive to shippers than a reputation for intelligent and honest inspection and weighing.

But *whether the police power of the State should be exercised or not in such matters, and if exercised to what extent, are questions in the first instance for the General Assembly and not for the courts.*

In the law governing the case before us the General Assembly
36 *has gone no further in the exercise of this police power* than to provide for State inspection and State weighing of grain going into or out of public warehouses.

We rest our judgment therefore in favor of the respondents, *not on the ground that the General Assembly could not, under the Constitution, pass a law requiring inspection and weighing* of grain in the great markets of this State other than such as goes into or out of a public warehouse, *but on the ground that the General Assembly has not done so.*"

The italics are ours. The law then under consideration did not specifically prohibit the giving of a weight certificate by persons other than state officials, as does the law now. The opinion therefore as to the rights of boards of trade under the then laws, has but little weight in determining the questions in this case. Nor is there anything in that opinion which thwarts a holding to the effect that the present inspection laws are valid. On the contrary the concluding portion of such opinion, quoted, supra, would indicate that such exercise of the police power would be valid.

We are also cited to Merchants Exchange vs. Knott 212 M. l. c. 635. A reading of that case, and of the case of People vs. Harker

91 Ills. l. c. 367, cited and quoted from therein, will show that the questions involved and discussed are wholly foreign to the ones here involved.

The questions here are, should the respondent be precluded from issuing weight certificates, or any paper or ticket purporting to be the weight of any car, wagon, sack, or other packages of grain, received at the public warehouses and elevators in St. Louis, where our inspection laws apply. Or shall respondent be permitted to make any charges for weighing or issuing weight certificates or tickets. These are the things forbidden by section 63 of the act of 1913 (Laws of 1913 p. 372) and are the things the state seeks to prevent the respondent from doing. And, these are the things which respondent
37 admits it has been doing. This statute forbidding persons, other than the bonded officers of this state, from doing these things had in view the general welfare under repeated rulings of this court. Such statutes were intended for the protection of producers, shippers and receivers of grain and hay, as well as other parties interested therein as owners, pledgers, or pledgees. We are unable to say that the statute is an improper exercise of the police powers of the state. If so the respondent should be prevented from issuing any weight certificates or any paper or ticket purporting to be the weight of any car, wagon sack or other packages of grain weighed at any public warehouse or elevator in the city of St. Louis, and from charging for any weighing or weight receipt for any grain at such public warehouse or public elevator, where state weighers are stationed under the laws of this state.

IV.

It is suggested by able counsel that the act should be so construed as to permit the weighing and certifying of weights both by the state and the respondent. The statute will not bear such a construction. It was clearly the legislative intent to make the state the weighmaster, and to exclude others from giving weight tickets or certificates. The very purpose of the law would be thwarted in the construction sought. Of course the law in no way prohibits owners of grain from weighing their grain before it is sent to or put in a public warehouse, to the end that they may know what they have, nor does it prohibit such owners from weighing it after it is withdrawn. So that the argument that no opportunity is afforded to have evidence to refute the prima faci- showing of the state's certificate of weight, is without foundation. By this we do not mean that such owners may force such previous or subsequent weighing upon scales provided for by the law for the use of the state authorities. The state authorities are entitled to proceed with their work without hinderance, or interference in any respect.

38 ## V.

Nor do we think these laws interfere in a material sense with interstate commerce. The police powers of the state has full recognition

by the Federal government, and unless the laws passed in pursuance of such powers unduly interfere with the commerce clause of the Federal constitution they have been upheld *of* the U. S. Supreme Court. Pittsburg vs. Coal Co. vs. Louisiana, 156 U. S. 590: Sherlock vs. Alling 93 U. S. 99: Munn vs. Illinois 94 U. S. l. c. 135: Turner vs. Maryland, 107 U. S. 38.

These laws do not purport to regulate interstate commerce. They are made applicable solely to citizens of the state, and property in the state. In the Sherlock case, supra, the U. S. Supreme Court, well said:

"And it may be said, generally, that legislation of a state, not directed against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

What has been said by the courts with reference to elevation of grain in transit being a part of the transportation, and therefore the rates charged, under the control of the Interstate Commerce Commission, are foreign to the questions involved here. This contention is therefore ruled against the respondent.

We are therefore forced to conclude that the respondent should be adjudged guilty of the charges of usurpation in the information contained i. e. (1) weighing the grain of the citizens of Missouri and charging therefor, and (2) issuing certificates of weight for grain deposited in the public warehouses and public elevators in the
39 city of St. Louis. These things the law forbids and the respondent has no legal right to do. To this extent a judgment of ouster is entered.

All concur, except Walker, J., not sitting.

W. W. GRAVES, *J.*

40 And thereafter, to-wit, on the 4th day of January, 1916, the following further proceedings were had in said cause, to-wit:

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Now at this day there are presented by the said respondent to Honorable W. W. Graves, Chief Justice of the Supreme Court of Missouri, in chambers, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, a citation citing and admonishing the said relator to be and

appear in the Supreme Court of the United States within thirty days from and after the date thereof, and a supersedeas bond in the sum of Five Hundred Dollars ($500.00); which said writ of error is allowed, said assignment of errors ordered filed, said citation signed and ordered issued, and said bond, to operate as a supersedeas, approved and ordered filed.

41 Which said Petition for Writ of Error is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1916.

No. 18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Petition for Writ of Error and Assignment of Errors.

Now comes the Merchants Exchange of St. Louis and prays for a Writ of Error to the Supreme Court of the United States to review the judgment in the above-entitled cause, and assigns as errors that the Court erred:

1. In holding to be valid and constitutional the Act of the legislature of Missouri, approved March 20, 1913, entitled "An Act to repeal Article 2 of Chapter 60 of the Revised Statutes of Missouri, 1909, relating to inspection of grain and hay, and to enact in lieu thereof a new article, to be known as Article 2, relating to inspection and weighing of grain, abolishing the office of Railroad and Warehouse Commissioners, creating the office of Warehouse Commissioner and fixing his powers and duties, with an emergency clause."

2. In holding to be valid and constitutional Section 63 of the Act above-mentioned, approved March 20, 1913.

3. In holding that said Act, and that the said Section 63 of said Act, did not, nor did either of them, interfere either with the petitioner's liberty, or its right of contract, or its right to enjoy the gains of its industry, and did not either of them deprive it of liberty and property without due process of law, all in violation of the 14th Amendment to the Constitution of the United States.

4. In not holding that said Act, and Section 63 of said
42 Act, was an unreasonable exercise of the police power, and therefore violative of said 14th Amendment to the Constitution of the United States.

5. In not holding that said Act, and especially Section 63 thereof, denied to petitioner the equal protection of the laws accorded to it by the said 14th Amendment to the Constitution of the United States.

6. In holding that the said statute was not an illegal and im-

proper interference with Interstate Commerce and with the Interstate Commerce clause of the Constitution of the United States.

7. In holding that the said State of Missouri, in the enactment of said Act, did not infringe upon the powers of Congress and the rights given to Congress by Section 8 of Article 1 of the Constitution of the United States, and did not impose a burden on Interstate Commerce in violation of said section.

FRANK HAGERMAN AND
PERCY WERNER,
Attorneys for Petitioner.

Allowed this 4th day of January, 1917.

W. W. GRAVES,
Chief Justice of the
Supreme Court of Missouri.

[Endorsed:] No. 18956. In the Supreme Court of Missouri, Oct. Term 1916. State of Missouri ex rel. Relator v. Merchants Exchange of St. Louis, Respondent. Petition for Writ of Error. Filed Jan. 4 1917. J. D. Allen, Clerk.

43 Which said Assignment of Errors is in words & figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1916.

No. 18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

Assignment of Error by Respondent (Plaintiff in Error).

Now again comes respondent (plaintiff in error) by its attorneys in the above entitled cause of State ex rel. v. Merchants Exchange of St. Louis, and assigns error in the record and proceedings of the Supreme Court of the State of Missouri in the following particulars, to-wit:

1st Assignment of Error.

The said Supreme Court of Missouri erred in holding to be valid and constitutional the Act of the Legislature of Missouri approved March 20, 1913, entitled "An Act to repeal Article 2 of Chapter 60 of the Revised Statutes of Missouri, 1909, relating to inspection of grain and hay, and to enact in lieu thereof a new article, to be known as Article 2, relating to inspection and weighing of grain, abolishing

the office of Railway and Warehouse Commissioners, creating the office of Warehouse Commissioner and fixing its powers and duties with an emergency clause."

2nd Assignment of Error.

The said Supreme Court of Missouri erred in holding to be valid and constitutional Section 63 of the Act above mentioned approved March 20, 1913.

Third Assignment of Error.

The said Supreme Court erred in holding that said Act and that the said Section 63 of said Act did not, nor did either of
44 them, interfere either with the petitioner's liberty, or its right of contract, or its right to enjoy the gains of its industry, and did not either of them deprive it of liberty and property without due process of law all in violation of the 14th Amendment to the Constitution of the United States.

4th Assignment of Error.

The said Supreme Court erred in not holding that said Act and Section 63 of said Act, was an unreasonable exercise of the police power, and therefore violative of said 14th Amendment to the Constitution of the United States.

Fifth Assignment of Error.

The said Supreme Court erred in not holding that said Act and especially Section 63 thereof, denied to petitioner the equal protection of the laws accorded to it by the said 14th Amendment to the Constitution of the United States.

6th Assignment of Error.

The said Supreme Court erred in holding that the said Statute was not an illegal and improper interference with Interstate Commerce and with the Interstate Commerce clause of the Constitution of the United States.

7th Assignment of Error.

The said Supreme Court erred in holding that the said State of Missouri, in the enactment of said Act did not infringe upon the powers of Congress and the rights given to Congress by Section 8 of Article I of the Constitution of the United States, and did not impose a burden on Interstate Commerce in violation of said Section.

Wherefore said respondent (plaintiff in error) by its attorneys

prays that for each of said errors assigned, and for any other
45 plain and manifest error to its prejudice herein, said judgment of said Supreme Court of Missouri be reversed, and such further orders be made herein as may be just.

FRANK HAGERMAN &
PERCY WERNER,
Attorneys and of Counsel for said Plaintiff in Error (Respondent).

[Endorsed:] No. 18956. In the Supreme Court of Missouri, Oct. Term, 1916. State of Mo. ex rel. Relator v. Merchants Exchange of St. Louis, Respondent. Assignment of Errors. Filed Jan. 4, 1917. J. D. Allen, Clerk.

46 Which said citation is in words and figures as follows, to wit:

Citation.

IN THE UNITED STATES OF AMERICA:

To Hon. John T. Barker, Attorney General of the State of Missouri:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date this citation bears date, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of Missouri, wherein Merchants Exchange of St. Louis is plaintiff in error and the Attorney-General of the State of Missouri is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. W. Graves, Chief Justice of the Supreme Court of Missouri, this Fourth day of January, 1917.

W. W. GRAVES,
Chief Justice.

Due service of the within citation accepted on behalf of defendant in error this Fourth day of January, 1917.

JOHN T. BARKER,
Attorney General.
LEE B. EWING,
Assistant Attorney General.

[Endorsed:] No. 18956. In the Supreme Court of Missouri, Oct. Term, 1916. State of Missouri ex rel. Relator v. Merchants Exchange of St. Louis, Respondent. Citation. Filed Jan. 4, 1917. J. D. Allen, Clerk.

47 Which said bond to act as a supersedeas is in words and figures as follows, to wit:

Bond.

Know all men by these presents, That We, Merchants Exchange of St. Louis, as principal, and Percy Werner, as surety, are held and firmly bound in the penal sum of Five Hundred Dollars ($500.), to be paid to defendant in error, for the payment of which well and truly to be made we jointly and severally bind ourselves, our successors and assigns firmly by these presents.

The Condition of this obligation is such That, Whereas, in the above case a judgment has been entered of partial ouster, and it is the desire of the plaintiff in error to review the judgment and decision of said court in the Supreme Court of the United States, and a writ of error has been prayed for and allowed to that end; Now, Therefore, if Merchants Exchange of St. Louis, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then the above obligation to be void; otherwise to be and remain in full force.

In witness whereof, the said Merchants Exchange of St. Louis has caused these presents to be signed by its President, and its corporate seal to be hereto affixed, and the said surety has hereunto set his hand and seal, this 4th day of January, 1917.

[SEAL.] MERCHANTS EXCHANGE OF ST. LOUIS,
By JOHN O. BALLARD,
Vice-President.

EUGENE SMITH, *Secretary.*

PERCY WERNER. [SEAL.]

The foregoing bond is approved as a supersedeas this 4th day of January, 1917.

W. W. GRAVES,
Chief Justice of the Supreme Court of Missouri.

48 In the Supreme Court of Missouri, October Term, 1916.

No. 18956.

STATE OF MISSOURI, at the Relation of John T. Barker, Attorney General, Relator,

vs.

MERCHANTS EXCHANGE OF ST. LOUIS, Respondent.

To the Honorable J. D. Allen, Clerk of Supreme Court, State of Missouri:

Please prepare and transmit a transcript of the record in the above entitled cause, and include in such transcript of the record the fol-

lowing pleadings, records, and proceedings had and entered of record in the Supreme Court of the State of Missouri, to-wit:

Relator's amended petition in quo warranto.
Respondent's amended return to order to show cause.
Relator's demurrer to amended return.
Stipulation to amended return.
Judgment of the Supreme Court of Missouri.
Opinion filed by the said Supreme Court.
Together with all orders of court and record of entries in said cause.
Petition for writ of error to the Supreme Court of the United States filed January 4, 1917.
Assignment of errors filed with said petition.
Order allowing writ of error and fixing terms of supersedeas dated January 4, 1917.
Writ of error dated January 4, 1917.
Citation dated January 4, 1917.
Precipe for transcript on writ of error.
Supersedeas bond.

PERCY WERNER,
Attorney for Merchants Exchange of St. Louis, Plaintiff in Error.

O. K.
LEE B. EWING,
Ass't Att'y General.

[Endorsed:] No. 18956. In the Supreme Court of Missouri, Oct. Term, 1916. State of Missouri ex rel. Relator v. Merchants Exchange of St. Louis, Respondent. Præcipe for Transcript. Filed Jan. 4 1917. J. D. Allen, Clerk.

49 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the Honorable W. W. Graves, whose name appears signed to the original writ of error and citation, and to the other original papers herein referred to (copies of which are hereto attached) was at the time of signing the same and is now the Chief Justice of the Supreme Court of the State of Missouri; that his said signature to the papers above indicated is genuine and that full faith and credit should be given the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson this 19th day of January, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, by virtue of the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing is a full, true and correct transcript of the record and proceedings in the case of State of Missouri at the relation of John T. Barker, Attorney General, Relator versus Merchants Exchange of St. Louis, Respondent as directed by the præcipe filed and made a part hereof, and as the same appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri hereto, at my office in the City of Jefferson this 19th day of January, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court
of the State of Missouri.

Endorsed on cover: File No. 25,739. Missouri Supreme Court. Term No. 909. Merchants Exchange of St. Louis, plaintiff in error, vs. The State of Missouri, at the relation of John T. Barker, Attorney General. Filed February 2d, 1917. File No. 25,739.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

MERCHANTS EXCHANGE OF ST. LOUIS,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI AT THE RELATION OF JOHN T. BARKER, ATTORNEY GENERAL.

No. 25,739

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

This is a proceeding in the nature of a *quo warranto*, brought at the relation of the Attorney-General of Missouri against the Merchants' Exchange of St. Louis. The proceeding was instituted in the Supreme Court of Missouri, and was based upon a statute of Missouri relating to the inspection of grain. (Session Acts Mo. 1913, pp. 354-373.) That statute, with the

exception of the eighth section thereof, as stated below, was adopted in 1913, and went into effect on April 15th of that year. The Act created the office of Warehouse Commissioner of Missouri, and committed to him exclusively the inspection and weighing of all grain going into, or delivered from, practically all the public elevators in that State. Section 8 of said Act, as amended in 1915 (see Missouri Session Acts 1915, p. 302), provided that all buildings, elevators or warehouses in St. Louis, Kansas City and St. Joseph used for storing or transferring grain of different owners for a compensation should be deemed public warehouses, and the owners of such buildings or elevators should be deemed public warehousemen. No grain could be inspected or weighed, in or out of such public elevators, except by the appointees of the Warehouse Commissioner.

The Act not only created the above-mentioned office, and committed to the Commissioner the inspection and weighing of all grain passing into or out of public warehouses, but its provisions were guarded and enforced by declaring its violation and the interference of any person with the Warehouse Commissioner or his appointees to be misdemeanors, highly criminal, and by imposing severe penalties for such violations. Thus Section 44 declared that anyone other than such appointees who should assume to act as an inspector of grain should be liable to a fine of not less than one hundred dollars, nor more than five hundred dollars, or to imprisonment for not less than three months, nor more than six months, or to both such fine and imprisonment. Section 63 declared all weighing done in said cities by a person other than the appointees of the Warehouse Commissioner unlawful, and further declared the person doing such weighing, or certifying

such weighing, or charging for it, to be guilty of a misdemeanor, punishable by a fine of not less than five hundred dollars, nor more than one thousand dollars, or by imprisonment not less than six months nor more than twelve months, or by both such fine and imprisonment.

The original Information in this proceeding was filed at the April Term, 1915, of the Missouri Supreme Court, and at said term that Court entered an order that the respondent, the Merchants Exchange of St. Louis, should appear and show cause against the issue of said writ on July 14, 1915, being a day of the said April Term. On said July 14, 1915, respondent appeared and filed its Return to the said order, and thereupon the case went over, by order of Court, to the October Term thereof, and subsequently to the April Term, 1916, of the said court.

At the April Term, 1916, being April 21st of that year, the relator, by leave of Court, filed an Amended Information and the cause was continued to the October Term, 1916. As the dates of the various steps in this proceeding are important, we state briefly that the Amended Information was filed on April 21, 1916, and on the same day the respondent filed its Return to the said Amended Information, said Return alleging, among other grounds of defense, that "the said information does not state facts sufficient to constitute a cause of action against respondent, nor does it state facts sufficient to warrant the relief prayed for" (Rec., p. 5); and on the same day relator filed a demurrer to the said amended Return of the respondent, alleging four grounds: *First,* that the Return is argumentative, and does not take issue with the original petition; *second,* because the Return constitutes no defense; *third,* because, if all the allegations in the Return

are true, relator is sti'l entitled to the relief asked for in the original petition; and, *fourth*, because none of the allegations in said Return constitutes any defense to relator's cause of action.

On October 26, 1916, being a day of the October Term of that year, the case was argued and submitted to the Court, which on December 21, 1916, being a day of said October Term, rendered judgment in favor of the relator, sustaining relator's demurrer, and finding that the respondent was guilty of unlawfully, wrongfully and willfully maintaining a department known as a weighing bureau, and by and through such weighing bureau of unlawfully and wrongfully, and in violation of the statutes of the state, weighing grain received into or discharged from public warehouses and elevators in the City of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor, whereby it had abused and misused the authority, franchises and privileges conferred upon it as a corporation by the laws of the state. The judgment then proceeded as follows: "It is therefore considered, ordered and adjudged by the Court that the said respondent be, and is hereby, ousted of its usurped power of weighing grain received into or discharged from public warehouses and elevators in the City of St. Louis, and making charges therefor, and issuing certificates or tickets and making charges therefor." On the same day the opinion of the Court was filed. The judgment will be found on pages 16-17 of the Record. The opinion of the Court is on pages 17-25 of the Record.

It will thus be seen that the ground upon which the Attorney-General asked to have the respondent ousted of its franchises was that it had violated the Missouri Act so far as that Act relates to the weighing of grain.

The particular section under which the Attorney-General proceeded is Section 63. (See Laws 1913, p. 372.) That part of the section involved in this proceeding reads as follows:

> "Sec. 63. It shall be unlawful for any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate, or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars, nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment."

The specific charge set forth in the Information is that respondent (plaintiff in error) is "unlawfully, wrongfully and willfully maintaining a department known as its Weighing Bureau, by and through which it is now unlawfully and wrongfully, in violation of the statutes of this state, weighing grain received into or discharged from public warehouses and elevators in the City of St. Louis, and making charges for said weighing, and issuing weight certificates or tickets and making charges therefor; that said acts of said re-

spondent are usurpations of powers, rights and privileges not conferred upon it by its corporate charter and in excess thereof, and are in violation of the criminal statutes of this state, all to the great and permanent injury of the citizens of Missouri." (Record, p. 4.)

The return of respondent, which was demurred to by the Attorney-General and which the State Court held insufficient as a defense to this proceeding, contained a denial that respondent has ever been guilty of improper uses and acts, or has misused or abused its rights and privileges as a corporation, in any of the particulars mentioned in the amended petition or otherwise; admits that it does issue a certificate to its members who request the same, evidencing, among other facts, the weight of grain handled by such members.

The Return further alleges that similar departments of weights are maintained by the Boards of Trade and Exchanges of Chicago, Kansas City, Cincinnati, Baltimore, Buffalo, Memphis, Cairo, New Orleans, Nashville, Detroit, Milwaukee, Peoria, and other large cities in the West and Southwest, where Boards of Trade and Exchanges exist, and all trades made between members of respondent with each other, or with members of other Exchanges, covering the buying and selling of grain, are, except where otherwise specifically stated, made on the basis of Exchange weights, and all accounts sales rendered by respondent's members to shippers, for whom such grain is handled, which said accounts show the grade, weight, switching expense and inspection, are accompanied by the certificates of the Weighing Department of Respondent; that practically all of the business done by members of the Exchange is done not with individual farmers who raise the grain, but with grain dealers or shippers *through-*

out the country who purchase from the farmers and pay for it as it is delivered either into local country elevators or to track buyers; and that respondent's Weighing Department is maintained and operated only so far as its members desire to avail themselves of its services, it being entirely optional whether or not they shall use the services.

It is further stated in said Return that respondent has for a number of years supervised the weighing of grain received in and shipped from the St. Louis market, and that the system of supervision which it has thus established has become vital to the commercial transactions of said market, increasing the grain trade therein, and increasing the reputation of said market for correct weighing and fair dealing over a wide section of country, inclusive of all sources of grain shipments to said market in Missouri *and in the surrounding states.* The Return further states that the standing of respondent among the Exchanges and Boards of Trade *throughout the United States* is most excellent, due to a great degree to the efficiency with which the Department of Weights performs its duties; and that respondent's certificates of weight have, by reason of their uniform accuracy, established the reputation of its market *throughout a wide area* of this country, and have proved of great value to the raisers of grain, to grain dealers, and to others shipping to said market; and that it is essential to its maintenance as an Exchange, and essential to enable its members to transact business with the members of other Exchanges *throughout the country,* that its Department of Weights be maintained and operated.

The Return then contains allegations to the effect

that the Missouri Act is unconstitutional in several respects, as follows:

(a) It violates certain of the provisions of the Missouri Constitution, the particulars being set forth on pages 11-13 of the Record.

(b) It violates section 4 of article 2 of the Missouri Constitution, and section 30 of said article 2 in various particulars which are set forth in the Return.

(c) It violates certain provisions of the Constitution of the United States, to-wit, section 1 of the 14th Amendment of said Constitution, in that it denies to the members of respondent the equal protection of the laws, and deprives such members of their liberty and property without due process of law.

It also violates section 8 of article 1 of the Federal Constitution in the particulars set forth under (e) on pages 13 and 14 of the Record.

Inasmuch as the demurrer admits the truth of all the facts pleaded in the said Return, the question to be discussed on this writ of error is whether or not those facts present a good defense in law to the Information, and good ground for refusing the prayer of the relator.

There are certain facts of which the Court will take judicial notice, as that the three cities to which the Missouri statute applies, St. Louis, Kansas City and St. Joseph, are all located on the border of the state. It is also a fact so well known that this Court may well take judicial notice of it, that the grain, or at least a large portion of the grain, which is handled in each and all of those cities is grain which comes into

Missouri from other states, or is shipped from some point in Missouri to some other state, or passes through Missouri on the route from one state to another, and thus forms a part of interstate commerce.

But, whether or not this Court will take judicial notice of these facts, the Return itself states them with fullness and clearness, and the demurrer admits them.

Turning now to the respondent's Return to the Information of the Attorney-General, we find on pages 7 and 8 of the Record, under Regulation III, that some part of the weighing done by the respondent is done in East St. Louis, a city in the state of Illinois, and that grain weighed by respondent is loaded both into and out of the elevators of said city.

Again, from pages 8 and 9 of the record it appears that the members of respondent who deal in grain here in St. Louis operate through Boards of Trade and Merchants' Exchanges in other cities and in other states; it being stated in the Return, *inter alia*, that the business of respondent's members is done with grain dealers or shippers "*throughout the country.*"

Again it is stated, on page 9, that the weighing by respondent and the giving of certificates of weight has increased the grain trade, not only of St. Louis, but "*over a wide section of country*, inclusive of *all sources* of grain shipments to said market in Missouri, *and in the surrounding states.*"

It is further declared in and by the Return (see p. 10) that the weighing done by respondent is done "in the territory known as the St. Louis market, which includes points in East St. Louis and other adjacent places in Illinois." And one of the purposes for which the respondent exists is said to be "the dissemination of information in circular letters to upwards of 4,000

shippers in Missouri and *states tributary to the St. Louis market.*"

Again, quoting from the Return, "it is essential to its (respondent's) maintenance as an Exchange, and essential to enable its members to *transact business* with the members of other Exchanges *throughout the country,* that the said Department of Weights be maintained and operated."

Under subdivision (e) of the Return, which begins on page 13 of the Record, the facts bringing this case within the purview of the Interstate Commerce provision of the Constitution still more clearly appear. The facts alleged in that part of the Return are that a large part of the grain which is inspected and weighed by the Weighing Department of respondent is such as is shipped through St. Louis from some point in the state of Missouri, destined to some point in some state other than Missouri; or is shipped from some point outside of Missouri to St. Louis or some other point in Missouri; or is shipped from some point outside of Missouri to some other point outside of Missouri, but passing through St. Louis en route, a large proportion of which is passed through public elevators in the city of St. Louis for the purpose, and only for the purpose, of transferring the grain from one car to another, and in order to get official Merchants' Exchange weights.

Again, it is alleged in said Return that all interstate grain above referred to is, in the regular course of business, and as part of its interstate transit, received into elevators at St. Louis and East St. Louis, where it is made the subject of transfer in transit and elevation. And it is further alleged that it is commercially necessary to pass such grain through an elevator where it is elevated and weighed; that eleva-

tion consists of the unloading of grain from cars or vessels into elevators and the reloading of the grain out into other cars or vessels, and such elevation is indispensable to weighing in the elevator. The Return further says that each act, that of weighing and that of elevating, is a necessary step in transportation, and such elevation and such weighing, each is and has been for years, under the existing conditions and methods of transportation in and through St. Louis, an indispensable means of the transfer in transit of grain from the cars or vessels of one carrier to those of another, and each is a necessary service in connection with the elevation and transfer in transit of grain, and is a necessary instrumentality and facility for the interstate shipment and carriage of grain. Furthermore, all grain stored in elevators in East St. Louis and other points in the state of Illinois opposite to the city of St. Louis is a part of the interstate traffic passing in the course of transportation to or through the St. Louis market, which market embraces territory and warehouses on both sides of the Mississippi River, as is set forth in a previous part of said Return.

In interstate shipments of grain the certification of weights and of grades by respondent is essential to the protection of all parties transacting grain business in said market, and the denial of the right to persons other than state inspectors and weighers, directly and not incidentally or remotely, affects interstate commerce and imposes a burden upon such commerce.

At the time this petition in the nature of a writ of *quo warranto* was filed, and thereby this proceeding commenced, Congress had not seen fit to act upon the general subject of inspection and grading of the various kinds of grain which were grown and handled in this country. But while the suit was pending, and be-

fore the State Court had rendered its decision therein, to-wit, on August 11, 1916, Congress did act by adopting a law which completely covers the inspection, grading, handling and dealing in, grains of all kinds, when they are the subjects of interstate commerce. And every regulation which the state statute prescribes as to these matters has its counterpart in the Act of Congress of August 11, 1916, entitled the U. S. Grain Standards Act. Hence, as plaintiff in error contends, that Act has wholly superseded and nullified the state statute on which this *quo warranto* proceeding was based.

Under the system adopted by the respondent, and which has been carried on for many years, one of the employees of respondent is always present at the inspection of grain, and is always present when it is weighed. That employee watches both operations, sees in each case that the proper methods are employed to insure correctness and that no necessary detail of the operation is omitted. When the inspection is finished, when the weighing is concluded, that employee knows, by reason of his supervision, whether the grain has been correctly graded, and whether the correct weight of the grain has been certified by the state officials. From the information thus obtained, he makes a certificate and delivers it to the party concerned as owner, or purchaser, or seller. Thus the owner, or purchaser, or vendor, has the two written statements, one from the state officials and the other from the employe of respondent. If both agree, he may rest assured that the grade and weight are correct. If they differ, he is in a position to investigate and discover where the error has arisen, what is the true grade and what the true weight. We believe these facts fairly appear from the statements of the return. And it is for the learned

Attorney-General to point out how, and for what reason, anyone is injured by this course.

We desire particularly to call the Court's attention to Sections 46 to 48, inclusive, of the Missouri law, which provide that any person who is dissatisfied with any *inspection* by a state official has a remedy by appeal to the Arbitration Committee created under those sections. But the Act gives no recourse to a dealer or shipper, or to any person interested, who is dissatisfied with the decision of a state weigher. On the contrary, the Act is designed to prevent (see excerpt from the Court's opinion, p. 30, *infra*) and, if held valid, will prevent, such dissatisfied person from availing himself of any other remedy, except, possibly, a long law-suit on the weigher's bond. He is prevented from adopting the only practical method of showing that the state weighing is incorrect.

The Purpose of Respondent's Acts and Their Effect.

There is one fact that will impress itself upon the Court in considering the questions involved in this proceeding. That fact is that respondent is not seeking to deprive the Commissioner of any legal rights, or to interfere with the performance by him of any of the duties enjoined upon him by the state law. There is no averment in the information that the Commissioner, or the state of Missouri, is now, or will in the future be, injured by the acts charged in the information to have been committed by respondent. The state will be no better off, and the Commissioner will be no better off, officially or individually, if respondent's acts be declared illegal and it be forbidden to continue them. On the other hand, the Commissioner is himself attempting to deprive respondent's members of rights

which they claim, and have long claimed to possess, is endeavoring to take from respondent's members the additional security which they are now obtaining from the supervision by respondent of the weighing of grain which comes to the market consigned to members of the respondent, or which is bought or sold by its members. In all the authorities cited by relator in the state court, the element is present which is lacking in the case at bar. For in all those cases the party alleged to have violated the statute or ordinance *has interfered with the state or city official in the performance of his official duties;* has even assumed to perform those duties; has denied the right of the official to perform the duties. Upon that fact the decision of the respective cases has turned.

Our contention is that, neither under its police power nor on any other ground, has the state a right to make it criminal for a person to weigh, or supervise the weighing, or certify as to the weight, of any commodity, so long as the state official is left, as he is in the instant case, free to perform his duties and to be paid for the performance of them, in regard to that commodity (see Record, foot of page 9); and so long as individuals are left at liberty to do, with reference to all other commodities, the various acts which are made criminal by the first part of Section 63.

Our further contention is that the Act of August 11, 1916, commonly known as the United States Grain Standards Act, has covered the entire field of inspection, grading and handling of grain, and has superseded the state law upon which this prosecution is based.

We assign the following errors:

ASSIGNMENT OF ERRORS.

I.

The Court below erred in sustaining the demurrer to respondent's Return.

II.

The Court below erred in holding to be valid and constitutional the Missouri Act relating to the inspection of grain and hay, approved March 20, 1913, and contained in the Session Acts of Missouri for the year 1913, on pages 354 to 373, both inclusive, and for the year 1915, on page 302.

III.

The Court below erred in holding to be valid and constitutional Section 63 of the said Act.

IV.

The Court below erred in holding that said Act and said section did not interfere either with the respondent's liberty, or its right of contract, or its right to enjoy the gains of its industry, and did not deprive respondent of liberty and property without due process of law, all in violation of the 14th Amendment to the Federal Constitution.

V.

The Court below erred in not holding that said Act, and Section 63 thereof, were an unreasonable exercise

of the police power of the state of Missouri, and violative of said 14th Amendment.

VI.

The Court below erred in not holding that said Act, and Section 63 thereof, denied to respondent the equal protection of the laws accorded to it by the 14th Amendment to the Constitution of the United States.

VII.

The Court below erred in holding that the said Missouri statute was not an illegal and improper interference with Interstate Commerce, and with the Interstate Commerce clause of the Constitution of the United States.

VIII.

The Court below erred in holding that the state of Missouri, in the enactment of said statute, did not infringe upon the powers of Congress, and the right and authority given to Congress by Section 8 of Article 1 of the Constitution of the United States.

IX.

The Court below erred in holding that said Act did not impose a burden on interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States.

X.

The Court below erred in failing to rule that the Missouri statute was superseded and nullified by the Act of Congress of August 11, 1916, known as the United States Grain Standards Act.

POINTS AND AUTHORITIES.

I.

The Missouri Grain Inspection Act is repugnant to the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to grain dealers in Missouri the equal protection of the laws, abridges their privileges and immunities, and deprives them of liberty and property without due process of law.

Lochner v. New York, 198 U. S., at pages 52-3 and 58;
Truax v. Raich, 239 U. S. 33, 41;
Adams v. Tanner, 244 U. S. 590;
Allgeyer v. Louisiana, 165 U. S. at page 589, where it is said that the right to follow any of the common occupations of life is an inalienable right;
Butchers' Union v. Crescent City Co., 111 U. S. 746, 762-65;
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 159;
State v. Miksicek, 225 Mo. 561, 568;
State v. Loomis, 115 Mo. 307, 316;
Starne v. People, 222 Ill. 189, 194; 113 Am. St. Rep. 389;
Grossman v. Caminez, 79 App. Div. 15, 20;
Ritchie v. Illinois, 155 Ill. 98.

(a) The foregoing construction of the Amendment has been repeatedly affirmed by this Court in cases

where the attempt has been made to enforce a criminal liability, among the latest decisions on the point being Adair v. United States, 208 U. S. 161; 52 L. ed. 436, and Adams v. Tanner, 244 U. S. 590; 61 L. ed. 1336.

(b) Section 59 of the Act in question here (Laws 1913, p. 371) makes the certificate of the official weigher *prima facie* evidence of the correctness of the weighing by declaring it to be "*prima facie* the basis of settlement between the buyer and the seller." Yet, since the effect of Section 63 is to take away the very means by which a buyer or a seller would be able to overcome the *prima facie* case made by the official certificate, that certificate becomes *conclusive* evidence, and thus *no "basis of settlement" is open to either buyer or seller.*

(c) While the construction of the state statute is for the State Court, yet the question whether the statute, *as construed,* is repugnant to the federal constitution, is one for this Court.

Price v. Illinois, 238 U. S. 446, 451;
Farmers' Irrigation Dist. v. Nebraska, 244 U. S. 325, 330;
Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 159-60;
Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59;
Northern Pac. R. Co. v. North Dakota, 236 U. S. 585, 595;
State v. State Board of Canvassers, 159 Wis. 216, 225.

II.

The three rights of life, liberty and property, mentioned in Section One of the 14th Amendment to the federal Constitution, are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in the deprivation of a right. Those terms are representative terms, and cover every right to which a member of the body politic is entitled under the law.

Hall v. Geiger-Jones Co., 242 U. S. 539, 548-9;
Allgeyer v. Louisiana, 165 U. S. 578, 589;
See, also, the other authorities cited under I, page 16, *supra.*

The carrying on of commerce, state or interstate, is a right, not a franchise or privilege granted by the state.

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 21;
International Text Book Co. v. Pigg, 217 U. S. 91, 109;
Vance v. Vandercook Co., 170 U. S. 438, 453, 455.
Munn v. Illinois, 94 U. S. 113, 146, 152 (dissenting opinion).

III.

The requirements, prohibitions and penalties of the Missouri statute cannot be sustained as constituting a proper and legitimate exercise of the State's police power.

1. All the authorities cited under the preceding

Points do, to a greater or less extent, sustain this proposition.

See, also, the following:

1 Tiedeman, State and Fed. Control, Sec. 1 and note: Sec. 3, p. 17; Sec. 90, p. 263;
Cooley Const. Lim. (7th Ed.), p. 559;
Walling v. People, 116 U. S. 446;
Munn v. Illinois, 94 U. S. 113, 124;
House v. Mays, 227 Mo. 617, 638; 219 U. S. 270, 282, 284.

2. The question whether any particular statute is a reasonable and necessary exercise of the state's police power, is one to be determined by the courts.

Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59;
Adair v. United States, 208 U. S. at pp. 172 and 174;
Lawton v. Steele, 152 U. S., at p. 137;
Scott v. Donald, 165 U. S. 58, 100;
Vance v. Vandercook Co., 170 U. S. 438, 449;
McLean v. Arkansas, 211 U. S. 539, 547;
Mugler v. Kansas, 123 U. S. 623, 661, 663.

3. The public interest cannot be invoked as a justification for demands which pass *the limits of reasonable protection.*

Vol. 22, A. & E. Enc., 938, 939;
Adair v. United States, 208 U. S., at pp. 172 and 174;
Northern Pacific R. Co. v. North Dakota, 236 U. S. 585, 595;

State v. Cantwell, 179 Mo., at pp. 263 and 272;
State v. Vandersluis, 42 Minn. 129;
Lawton v. Steele, 152 U. S., at page 137;
Tiedeman, State and Federal Control, Sec. 1, p. 5; Sec. 3, p. 17; Sec. 90, p. 263;
See, also, authorities under III, 2, next, *supra*.

And a statute enacted under the police power is, like any other law, subject to the "equal protection" clause of the Fourteenth Amendment.

Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59;
Mugler v. Kansas, 123 U. S. 623, 661, 663.

4. The constitutional safe-guards are violated by a statute which, under the guise of regulating, in fact prohibits, the doing of a lawful act or the pursuit of a lawful business.

State v. Cantwell, 179 Mo. 245, 272;
Adams v. Tanner, 244 U. S. 590, 593-5.
Re Jacobs, 98 N. Y. 98, 106, 112.

5. And the police power *ends* where the public interests are not beneficially served.

St. Louis v. Dreisoerner, 243 Mo. 217, 224.

6. The onerous and excessive penalties prescribed in Section 63 of the Act are such as to render it unconstitutional.

Cotting v. Kansas City Stock Yards, 183 U. S. 79, 101;

Ex parte Young, 209 U. S. 123, 129, 144-6;
McGahey v. Virginia, 135 U. S. 662, 694;
Consolidated Gas Co. v. Mayer, 146 Fed. 150, 154.
Easton v. Iowa, 188 U. S. 220, 232.

IV.

The Missouri Grain Inspection Law constitutes an interference with Interstate Commerce, and a burden upon it.

1. A remaining, and the most serious, objection to the Missouri statute from a constitutional point of view is that it directly affects Interstate Commerce, and thus infringes the provisions of Section 8 of Article 1 of the Federal Constitution.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, in which the term "Interstate Commerce" is defined;
Minnesota Rate Cases, 230 U. S. 352;
Sherlock v. Alling, 93 U. S. (3 Otto) 99, 102-04;
Sinnot v. Davenport, 63 U. S. (22 How.) 227, 241-2.
Rhodes v. Iowa, 170 U. S. 412, 415;
Vance v. Vandercook Co., 170 U. S. 438, 441;
Adams Exp. Co. vs. Kentucky, 206 U. S. 129, 135; s. c. 214 U. S. 218, 222.

2. In view of the averments of the Return, which the state's demurrer admits to be true, there can be no question that Interstate Commerce is involved here.

Peavey v. Union Pac. R. Co., 176 Fed. 409, 411, 418, 424-5;

Interstate Commerce Com. v. Diffenbaugh, 222 U. S., 43, 45, 49, 50;
Rhodes v. Iowa, 170 U. S. 412, 415;
Vance v. Vandercook Co., 170 U. S. 438, 444;
Adams Express Co. v. Kentucky, 214 U. S. 218, 222;
Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 50-1.

Matters of which the Court will take judicial notice point unerringly to the same conclusion.

Nicol v. Ames, 173 U. S. 509, 516-17;
United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 338.

3. Nor can there be any question that the Missouri law imposes a burden on that commerce.
See authorities cited above under IV; also:

Minnesota Rate Cases, 230 U. S. 352, 381-83, 394-5, 397-99; 400-401;
Philadelphia Mail Steamship Co. v. Pennsylvania, 122 U. S. 326, 336;
Vance v. Vandercook Co. 170 U. S. 438, 452-3, 455;
Adams Express Co. v. Kentucky, 206 U. S. 129, 135; 214 U. S. 218, 222;
Munn v. Illinois, 94 U. S. 113, 132;
Brown v. Houston, 114 U. S. 622, 634;
International Text Book Co. v. Pigg, 217 U. S. 91, 110.

It is immaterial whether or not the law was intended to burden commerce, if such was its practical effect.

West. Union Tel. Co. v. Kansas, 216 U. S. 1, 22, 27.

4. It is not only true that the state statute affects interstate shipments of grain as well as intrastate shipments, but it is equally true that grain handled in the three cities of Missouri covered by the statute, all of them being cities located on rivers which, to some extent at least, form boundaries to the state, constitutes in the largest measure interstate commerce.

See authorities *supra.*

5. Where the commerce is partly intrastate and partly interstate.

Minnesota Rate Cases, 230 U. S. 352, 399, 411;
Philadelphia Mail Steamship Co. v. Pennsylvania, 122 U. S. 326;
West. Union Tel. Co. v. Kansas, 216 U. S. 1, 27.

6. A shipment is none the less an interstate shipment because it is transhipped on the way, or is passed through elevators in St. Louis, Kansas City or St. Joseph for the purpose of transferring the grain from one car to another.

Bailey v. Railroad, 184 Mo. App. 457;
Conley v. Railroad, 183 S. W. 1111;
So. Pac. Terminal Co. v. Interstate Com. Com'n, 219 U. S. 498, 527; 55 L. ed. 310, 320;
Railroad Commission v. Worthington, 225 U. S. 101, 109; 56 L. ed. 1004, 1009;
Texas & Pac. R. Co. v. La. R. R. Commission, 183 Fed. 1005; s. c. 229 U. S. 336.

V.

The enactment by Congress of the United States Grain Standards Act of August 11, 1916, superseded and nullified the Missouri Grain Inspection Act, inasmuch as both statutes cover identical ground.

See 39 U. S. Stat. at L., p. 482;
See Sec. 2 of the Act; second paragraph of Sec. 7;
See Section 49 of the Missouri law (Laws Mo. 1913, p. 369); also section 44 (Laws Mo., 1913, p. 368);
Minnesota Rate Cases, 230 U. S. 352, 380, 396-99, 400;
West. Union Tel. Co. v. Kansas, 216 U. S. 1, 27;
Easton v. Iowa, 188 U. S. 220, 229;
Brown v. Houston, 114 U. S. 622, 630;
Adams Exp. Co. v. Croninger, 226, U. S. 491, 500.

1. The rule applies to Bankruptcy Laws and the National Banking Acts.

Sturges v. Crowninshield, 4 Wheaton, 122, 208;
Tua v. Carriere, 117 U. S. 201, 209.
Comm. v. Ketner, 92 Pa. St. 372; 37 Am. Rep. 692;
Allen v. Carter, 119 Pa. St. 192;
Easton v. Iowa, 188 U. S. 220, 229, 231.

2. The rule is applicable in cases of prosecution for crime.

In re Waite, 81 Fed. 359;
Ohio v. Thomas, 82 Fed. 304; s. c. 173 U. S. 276, 282, 283;

See, also, the Pennsylvania decisions, next, *supra.*

3. The Act of Congress is paramount and exclusive.

N. Y. Cent., etc., R. Co. v. Tonsillito, 244 U. S. 360;
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 204;
Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 497;
Robbins v. Taxing District, 120 U. S. 489, 494;
Minnesota Rate Cases, 230 U. S. 352, 399, 403;
Gilman v. Philadelphia, 3 Wall. 713, 725, 737.

"No state is at liberty to interfere with the operation of a law of Congress."

New York Cent. R. Co. v. Winfield, 244 U. S. 147, 153;
In re Neagle, 135 U. S. 1, 60, 62.

4. The rule applies even though the state and federal enactments do not conflict.

Charleston, etc., R. Co. v. Varnville Furn. Co., 237 U. S. 597, 604;
Nelson v. Black Bird Co., 2 Pet. 245.

5. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. The state law may be operative *until* Congress acts.

Gilman v. Philadelphia, 3 Wall. 713, 732;
Escanaba Co. v. Chicago, 107 U. S. 678, 683;

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, ..
Minnesota Rate Cases, 230 U. S. 352, 400;
New York Central R. Co. v. Winfield, 244 U. S. 147;
Cummings v. Chicago, 188 U. S. 410, 428;
New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 632;
Brown v. Houston, 114 U. S. 622, 630;
Cardwell v. Bridge Co., 113 U. S. 205, 210;
Adams Exp. Co. v. Croninger, 226 U. S. 491, 500.

6. It is immaterial that the present proceeding was instituted before the enactment by Congress of the Grain Standards Act, since that Act was in force before the judgment in the case at bar was rendered.

United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309;
Southern Pac. Terminal Co. v. Interstate Commerce Com., 219 U. S. 498, 515;
Boise City Irr. & Land Co. v. Clark, 131 Fed. 415;
United States v. Schooner Peggy, 1 Cranch 103, 110.

7. Even if it had been enacted subsequently to the rendition of judgment by the Missouri Court, it would have superseded the Missouri statute, and the judgment would have been nullified.

Crozier v. Krupp, 224 U. S. 290, 302;
Sturges v. Crowninshield, 4 Wheat. 122, 196.

8. The enactment by Congress of the Grain Standards Act worked a repeal of the state law, so that the

penalties prescribed in the state law cannot be enforced, nor its punishments inflicted.

Yeaton v. United States, 5 Cranch, 281;
Schooner Rachel v. United States, 6 Cranch, 329.
Tua v. Carriere, 117 U. S. 201, 209.
See, also, authorities under 7, next *supra*.

ARGUMENT.

I.

An examination of the Information by which this prosecution was instituted makes it clear that the proceeding is based upon Section 63 of the Missouri Grain Inspection Law (Mo. Laws, 1913, pp. 354-373; Laws 1915, p. 302). After stating that, under the laws of Missouri, it is unlawful for any person other than the duly authorized State Weigher to weigh any grain at a public warehouse or elevator in St. Louis, or to certify such weight, or to charge for weighing or certification, the Information goes on to allege that the respondent, plaintiff in error, has been for many years, and is now, unlawfully maintaining a Weighing Bureau through which it weighs grain received into or discharged from public warehouses and elevators in said city, and issues certificates of such weights, and makes charges for said services; that the said acts are usurpations of powers, rights and privileges, and are in violation of the criminal statutes of the state.

The Information closes with a prayer that respondent may be adjudged guilty of usurping privileges and authorities not granted by the State of Missouri in weighing the grain and charging therefor, and issuing weight certificates thereon, that such acts be declared illegal and void, and said respondent be forbidden to weigh such grain as aforesaid and charge therefor and from issuing weight certificates thereon, and that said respondent be fined in such sum as the Court thinks will punish it and cause others to re-

frain from doing similar acts, and for all other and proper relief. (See Record, p. 4.)

The section of the Missouri statutes which declares the weighing of grain, and certifying the weight, to be crimes, and which affixes a penalty to the doing of those acts, is said Section 63. It is the violation of that section on which the Attorney-General relies to sustain the foregoing charges. It is the violation of that section of which the respondent is by the judgment of the state court found guilty. That section, or so much of it as comes within the purview of the information, is set forth in our statement. (See *supra*, p. 5.)

In order that we may have before us the precise question which was passed upon by the state court, it is proper and necessary not only to consider the provisions of Section 63, but also the construction which the state court put upon that section. In the fourth paragraph of the Court's opinion, the learned Judge, referring to the contention of the Merchants' Exchange "that the Act should be so construed as to permit the weighing and certifying of weights both by the state and the respondent," says:

> "The statute will not bear such a construction. It was clearly *the legislative intent* to make the state the weighmaster *and to exclude others* from giving weight tickets or certificates. *The very purpose of the law* would be thwarted in the construction sought." Rec. p. 24.

Plaintiff in error is not permitted to question this interpretation of the statute, since such construction by the highest state court is conclusive. Moreover, we have no disposition to question it. That is the precise construction which we have given the Act;

and we believe it to be the only rational interpretation, the only meaning of which the language used is susceptible.

The question remains, the only question on this branch of the case, does the statute, thus construed, infringe upon the constitutional rights of the respondent? Does the statute, or does it not, violate the provisions of the 14th Amendment which are set forth in the respondent's Return? [See Record, pp. 12-13, subdivisions (b), (c), (d) and (e).] Does it deprive the members of respondent of life, liberty and property without due process of law? Does it deny to respondent's members the equal protection of the laws? Is the purpose of the law, "to exclude others from giving weight certificates," a purpose which the Federal Constitution condemns?

We contend that the very intent which the state court declares to have been the legislative intent in enacting this statute (p. 30, *supra*), does infringe the provisions of Section 1 of the 14th Amendment to the Federal Constitution, and in view of the enactment by Congress of the United States Grain Standards Act, it also infringes Section 8 of Article One of the Federal Constitution.

1. The position of plaintiff in error is that said Section 63 denies to a certain class, namely, dealers in grain, the equal protection of the laws; also deprives dealers in grain of life, liberty and property without due process of law; also abridges the privileges and immunities of said persons as citizens of the United States. For these reasons the state statute comes within the prohibition of Section 1 of the 14th Amendment to the Federal Constitution.

Plaintiff in error insists that this classification, this separation of dealers in grain from dealers in every other kind of merchandise, is not based upon any reasonable ground, but is purely arbitrary. Those alone who handle grain are singled out by the state statute to be branded as criminals, made liable to a fine of one thousand dollars and to imprisonment for an entire year, for merely weighing grain, or for merely certifying its weight; that is, for doing that which has in the past been done without any harmful results, *which does not interfere with the Warehouse Commissioner in the performance of any of his duties.* and which, instead of injuring the public, or any individual or citizen of the state, has been of benefit to the public and to the dealers, as is admitted by the state's demurrer.

The decisions of this Court are uniform to the effect that an arbitrary division of citizens into classes is repugnant to that equality of right which is required by the Federal Constitution, whenever certain rights are granted to one or more of such classes and denied to the others, or whenever certain penalties are visited on one or more classes from which the others are exempt. Therefore, that statute, which applies to the weighing of grain, and not to the weighing or measuring of any other commodity, is invalid, because it makes it a crime for any citizen who has not been appointed by the Warehouse Commissioner, under Section 59, to supervise the weighing of grain, makes it a crime to give a written statement of the result of such weighing, even makes it criminal for a dealer in grain to have his own grain weighed by his clerk and a written statement thereof made by such clerk. On the other hand, citizens who deal in any other merchandise or commodity are at liberty, without in-

curring any penalty, to weigh or measure, or to enter into contracts for having weighed or measured, the merchandise in which they deal, and to be furnished with a written statement of the weight or quantity. It will be noted that the Act in question is entitled: "An Act to Repeal Article 2 of Chapter 60 of the Revised Statutes of Missouri, 1909, Relating to Inspection of Grain *and Hay*, and to Enact in Lieu Thereof a New Article, * * * Relating to Inspection and Weighing of Grain, etc." (Laws Mo. 1913, p. 354.) It thus appears that up to the time of the adoption of the present statute by the Legislature of Missouri, it was recognized that the same reasons which called for the inspection and weighing of grain, also called for the inspection and weighing of hay. And while, upon the enactment of the present statute, all the provisions relating to the weighing of hay (Mo. Rev. Stat. 1909, Secs. 6832, 6833) were omitted, the provisions with reference to grain were permitted to stand, and were made even more stringent. This denial of equal rights, this prohibition of freedom of contract, constitutes a violation of the 14th Amendment.

We think it unnecessary to discuss here and at this time the power of a state legislature to enact regulations intended to safeguard the public against fraud and imposition; what we do contend is that the states cannot, without infringing constitutional prohibitions, deny to the dealer the equal right to protect himself against mistake, fraud and imposition, whether on the part of a public official or of others.

This doctrine has repeatedly met the approval of this Court. It has said that "the liberty mentioned in the 14th Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed

to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above-mentioned." Allgeyer v. Louisiana, 165 U. S. at page 589.

The same rule is recognized by Judge Black, of the Missouri Supreme Court, in State v. Loomis, 115 Mo. 307, at page 316, where he says: "Liberty, as we have seen, includes the right to contract as others may."

The opinion in the Allgeyer case, cited just above, contains the following excerpt from Mr. Justice Bradley's concurring opinion in Butcher's Union v. Crescent City, 111 U. S. 746, 762, as follows:

> "The right to follow any of the common occupations of life is an inalienable right. * * * This right is a large ingredient in the civil liberty of the citizen." (165 U. S., at pp. 589, 590.)

And quoting further from the same opinion:

> "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. * * * If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, *and giving to others the exclusive right to pursue it,* it certainly does deprive him to a certain extent of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." (*Ibid.*)

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th amendment."
>
> Lochner v. New York, 198 U. S., at page 53; 49 L. Ed., at page 940.

In the case last cited, this Court held that the statute in question there not only reached, but passed the limit of the police power. "If this statute be valid," says the Court, "and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go." (198 U. S., at page 58; 49 L. Ed., at page 942.) And the remark holds good in the case now before the Court.

In Truax v. Raich, 239 U. S., 33, 41, this Court says:

> "It is sought to justify this Act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, *the ordinary means of earning a livelihood* It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

The above was said in reference to a statute, the purpose of which was to prevent the employment in the

State of Arizona of aliens. If the courts so sedulously guard the rights of an alien, who has taken up his residence in one of the states of the Union, it certainly will not permit American citizens to be denounced as criminals because they employ a common and proper method of avoiding mistakes, or of preventing imposition, in the buying and selling of the articles in which they deal.

Turning again to the Missouri decisions, we find it announced that the right to purchase or sell labor is a part of the liberty protected by the Fourteenth Amendment. State v. Mikcicek, 225 Mo. 561, 568.

The rule is announced by the Ilinois Court in the following language:

> "If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of the right."
>
> Ritchie v. People, 155 Ill. 98, 105.

In Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, the Illinois Court again says:

> "The legislature canot ameliorate the coal miners' condition, under the guise of an exercise of the police power, and leave others unaided who suffer from like causes." (P. 195.)

Again the Court says, in the same opinion:

> "While the power of the legislature to form classes in reference to which the police power may be exercised is unquestioned, there can be no discrimination among individuals in forming such classes unless there is some difference in their con-

dition which causes them to *naturally* fall into different groups." (222 Ill., at p. 194.)

In a recent decision of the Supreme Court of New York we find a sentence which tersely states the rule:

> "The legislature may not," says that Court, "under the guise of protecting the public interests, *arbitrarily interfere with private business,* nor impose unusual and unnecessary *restrictions upon lawful occupations.*"
>
> Grossman v. Caminez, 79 App. Div. 15, 20.

The above extract from the opinion in the New York case is quoted with approval by the Missouri Supreme Court in Woolley vs. Mears, 226 Mo., at page 50.

We are unable to see any difference in principle between the statute so held invalid by the Missouri and the New York Supreme Courts and Section 63 of the Grain Act of Missouri. The statute in the New York case made it a misdeameanor to offer any real estate for sale without the written authority of the owner. Section 63 makes it a misdemeanor to certify in any manner whatever the weight of grain—of that commodity alone out of all the commodities dealt in in Missouri. If the one statute is unconstitutional the other must be. For each enactment is, to quote the language of the Missouri Court, "an arbitrary infringement upon the liberty and rights of all persons who choose to engage in such occupation." (226 Mo., at page 49.)

Is it possible to discover any difference in principle between the case at bar and that of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150; 41 L. Ed., 666? In the *Ellis* case, the state of Texas required railroad companies to pay an attorneys' fee in case of unsuccessful litigation. In the case at bar, a person handling grain

is punished criminally for signing a paper showing the weight of grain. In each case, the penalty is confined to one class of persons. In the *Ellis* case the act was pronounced invalid because it denied to railroad companies the equal protection of the laws, the Court saying that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any such basis." (165 U. S., p. 155; 41 L. Ed., p. 668.) That reason is equally applicable to the instant case.

Continuing, the Court says:

> "Arbitrary selection can never be justified by calling it classification." (165 U. S., p. 159; 41 L. Ed., p. 669.)

What reasonable basis, we ask, is there in the nature of things for putting into a class by themselves dealers in grain, when the only question involved is the right to have such grain weighed twice, or three times, or fifty times by as many different persons, and to pay all those persons for doing the weighing? to receive from such persons certificates of its weight, and to pay them all for such certificates?

2. While the construction of the statute is for the state court, and while that construction by the highest court of the state is conclusive in this court, yet the question whether the statute, as construed by the state court, is repugnant to the Federal Constitution, is one for the federal court.

Farmers Irrigation District v. Nebraska, 244 U. S. 325, 330;

Hutchinson Ice Cream Co. v. Iowa, 242 U. S., 153, 159-60;
Price v. Illinois, 238 U. S., 446, 451.

And this Court will pass upon that question whatever may have been the construction placed on it by the State Court.

Farmers Irrigation District v. Nebraska, 244 U. S. 325, 331-2;
Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59;
Northern Pac. R. Co. v. North Dakota, 236 U. S. 585, 595.

Thus this Court has said:

"The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this Court."

Scott v. Donald, 165 U. S., 58, 100.
Quoted in Vance v. Vandercook Co., 170 U. S. 438, 449 (42:1100, 1103).

"It is also true," says this Court in McLean v. Arkansas, 211 U. S., at page 547 (quoted in Adams v. Tanner, 244 U. S., at pages 595-6), "that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution."

This is fully recognized in the opinion of the state Court in the instant case. For the learned judge says in that opinion:

"The respondent urges that its private rights are invaded by these statutes, and if so, then the

> laws are invalid, unless they fall within the practically undefined field of police powers of the state. I say undefined, because the field of the public peace, health, safety and welfare is a very broad one, and there are many angles from which to view the field. Laws of the character of the ones here involved, where sustained, have been sustained upon the theory of police regulations. In other words, because they were a proper exercise of the police power of the state. *We shall not attempt to defend these laws otherwise.*" Record, p. 19.

The rule applies to state courts as well as to federal courts, that if, by judicial construction, a statute embodies a purpose which is unconstitutional, it must be condemned.

> State v. State Board of Canvassers, 159 Wisc. 216, 225.

II.

The three rights of life, liberty and property, mentioned in Section one of the Fourteenth Amendment to the Federal Constitution, are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in the deprivation of a right. Those terms are representative terms, and cover every right to which a member of the body politic is entitled under the law.

What is it of life, liberty and property that the Constitution protects? A late definition of what is included in and covered by these words is to be found in

a decision of this Court at its last term (October Term, 1916). It is said there:

> "What life is, and what may or may not affect it, we have quite accurate tests; and what liberty is in its outside sense, and in like sense what property is. We know that it is of the essence of liberty—indeed we may say of life—that there shall be freedom of conduct, and yet there may be limitations upon such freedom. We know that in the concept of property, there are the rights of its acquisition, disposition and enjoyment—in a word, dominion over it. Yet all of these rights may be *regulated.*"
>
> Hall v. Geiger-Jones Co., 242 U. S. 539, 548-9.

Yes, regulated, but not prohibited, not destroyed. See Adams v. Tanner, 244 U. S. 590; *Re* Jacobs, 98 N. Y. 98, 106, 112.

III.

The requirements, prohibitions and penalties of the statute under consideration cannot be sustained as a proper and legitimate exercise of the State's police power.

1. The question whether any particular statute is a reasonable, necessary and lawful exercise of the police power, is one to be determined by the Courts.

> Scott v. Donald, 165 U. S. 58, 100.
> Vance v. Vandercook Co., 170 U. S. 438, 449.

2. A statute enacted under the police power is, like any other law subject to the "equal protection" clause of the 14th Amendment. Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59.

"It does not at all follow that every statute, enacted ostensibly for the promotion of these ends" (i. e., public morals, public health, public safety) "is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the Courts must obey the Constitution rather than the law-making departments of the government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed."

Mugler v. Kansas, 123 U. S. 623, 661 (31:210).
Continuing the Court says:

"Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the General Government." *Id.* at page 663.

3. The public interest cannot be invoked as a justification under the police power of statutes *which pass the limits of reasonable protection.*

See authorities cited on page 31, *supra*, under III, 1 and 2.

"The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes. The police power must be so exercised as not to infringe arbitrarily or unreasonably *upon personal or property rights.*" 22 A. & E. Enc. 938, 939.

In Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, a case which is cited probably more frequently than any other, state or federal, in discussions concerning the police power, and which was a pioneer in extending this rather vague and undefined power, it is nevertheless said that while, by the social compact, each citizen covenants with the whole people that all shall be governed by certain laws for the common good, yet "this does not confer power upon the whole people to control *rights which are purely and exclusively private.*" (94 U. S., at page 124; 24 L. Ed., at page 84, col. 1.) "But," the court adds,

> "it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas. From this source* somes the police power."

As a corollary to this last statement, is it not equally true that the government as a whole cannot enact laws which "unnecessarily injure" one of its citizens?

In another decision this Court says:

> "To justify the state in thus interposing its auauthority in behalf of the public it must appear, first, that the interests of *the public generally,* as distinguished from those of *a particular class,* require such interference; and, second, that the *means* are reasonably necessary for the accomplishment of the purpose *and not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily *interfere with private business,* or impose unusual and unnecessary *restrictions upon*

lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, *but is subject to the supervision of the courts.*"

Lawton v. Steele, 152 U. S., at page 137; 38 L. Ed., at page 388.

Mr. Tiedeman, in his work on "State and Federal Control," in the note to Section 1, quotes from an opinion of the Supreme Court of Maine the following:

"How far the province of the legislature can extend is always submitted to its discretion, provided its acts do not go beyond the great principle of securing the public safety, and its duty to provide for the public safety within well defined limits and with discretion is imperative. All laws for the protection of lives, limbs, health and quiet of the person, and for the security of all property within the state, fall within this general power of government."

Tiedeman, State and Federal Control, sec. 1, p. 3.

And in the text that learned author cites Judge Cooley's work to the effect that the purpose of the police power is "to insure to each the *uninterrupted enjoyment of his own,* so far as it is reasonably consistent with a like enjoyment of rights by others." *Ibid.*

Continuing the author states that the power in question is but the putting into effect of the maxim "*Sic utere tuo,* etc.", and says:

"Any law which goes beyond that principle, *which undertakes to abolish rights,* the exercise of which *does not involve an infringement of the rights of others,* or to *limit* the exercise of rights

> beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. *It is a government usurpation,* and violates the principles of abstract justice, as they have been developed under our representative institutions." *Id.,* Sec. 1, p. 5.

And we call attention to the learned author's quotation from the decision of the California court in *Ex parte* Jentzsch, 112 Cal. 468, in which that court expresses the well founded opinion that our government was not designed to be paternal in its form, although (we beg leave to state) many instances of the exercise of that power are apparently paternalistic in the extreme. We respectfully insist that, notwithstanding the large number of paternalistic laws which have been enacted in recent years, we are, to borrow the language of the California court, still "a self-governing people"; and it is still true that "every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows."

We submit one more quotation from the authorities cited by Mr. Tiedeman:

> "If a statute, purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the Constitution."
>
> 1 Tiedeman, State and Federal Control, Sec. 3, p. 17.

Again it is said by the author:

> "The only constitutional question which can be raised in respect to legislation which is designed to

> prevent and punish fraud in intrastate transactions is whether the regulations go no further *than is necessary* to prevent or punish the fraud, *and do not infringe any vested rights which can be enjoyed without the commission of the fraud.*"
>
> *Id.*, Sec. 90, p. 263.

This court, in passing upon an Act of Congress in the light of the prohibition contained in the fifth amendment to the Federal Constitution, while stating that the liberty of which no person can be deprived embraces the right to make contracts as to labor, says that "each of said rights is subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as *inconsistent with the public interests,* or *as hurtful to the public order, or as detrimental to the common good.*"

> Adair v. United States, 208 U. S., at p. 172; 52 L. Ed., at p. 441.

In the same case, the Court, commenting on certain authorities, cited by it, says:

> "In every case that comes before this Court where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?" *Id.*, p. 174 [442].

In State vs. Cantwell, 179 Mo. 245, the Missouri court had occasion to consider a decision by the New York Court of Appeals, involving the validity of a law enacted under the police power. And the Missouri court makes the remark that, in the New York case, the statute was upheld because it does not "*restrict* or *prohibit* any of the rights of the citizen to contract and conduct his business, but simply *regulates* it"; in other words, because that New York statute did not have the effect which the Missouri Grain Inspection Act has, namely, to restrict and *prohibit* citizens to exercise the rights of citizens. (179 Mo., p. 272.)

In the case of House v. Mays, 227 Mo. 617, a case which went up to this court and is reported in 219 U. S. 270, the learned Judge who wrote the opinion for the Missouri court made this significant statement:

> "Where, therefore, police regulations are established, which give to private parties increased facilities for detecting and preventing fraud, these laws are free from all constitutional objections" (227 Mo. 638);

it being a quotation from Tiedeman on State and Federal Control. With reference to that remark, it is proper for us to say that we feel sure this court will never hold that means and methods may be adopted by the state for the prevention of fraud or mistake, while like means and methods are forbidden to the individual when adopted by him for a like purpose, that is to say, to protect *himself* against fraud, imposition or mistake.

For the view taken by this court in House v. May, see 219 U. S. at pages 282 and 284.

Unless the Court is prepared to say that all constitutional commands and restrictions are wiped out by this

intangible and undefined something denominated "The Police Power," the statute upon which this proceeding is based must, we submit, be declared null and void. For there can be no possible doubt that the Act, especially the 63rd section, destructively affects private and individual rights. The question to be decided, therefore, is: Is the benefit to the public sufficient to compensate for such destruction of rights? What the learned Missouri Court says on page 24 of the Record as to the purpose of this statute does not, we submit, go far enough. For its purpose would in no degree be thwarted by permitting respondent to test the correctness of the weighing done by the state. Has the public anything to gain which justifies the destruction by the legislature of these private rights? Unless there is some showing of benefit to the public, unless the state can point out some advantage gained by depriving the citizen of his right, the citizen ought not, and we believe cannot, be compelled to make the sacrifice.

That every person has the right to demand that he be governed by general rules cannot be gainsaid. Such is the law as expounded by Judge Cooley. (Cooley's Const. Lim., 7th Ed., p. 559.) And that learned author adds:

> "A special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

The question here is not: Who is benefited by the statute creating a state-wide inspection and weighing of grain? But it is: Who is benefited by prohibiting a dealer in grain from adopting the simplest and most

effective means of preventing unintentional mistakes in, or intentional falsifications of, the results of such inspection and weighing?

4. The Constitutional safeguards are violated by a statute which, under the guise of regulating, in fact prohibits, the doing of a lawful act or the pursuit of a lawful business.

Adams v. Tanner (244 U. S. 590) involved the question whether a statute of the state of Washington, which declared it to be unlawful to charge a fee for furnishing a person with employment, was a valid exercise of the legislative power of the state. The court held that the statute did violate the provisions of the 14th Amendment, because it is arbitrary and oppressive, and unduly restricts the liberty, guaranteed by that Amendment, to engage in a useful business.

The remark of this court, in its opinion, that the statute in question is one of prohibition and not regulation (244 U. S., at page 593), is clearly applicable to the case at bar. For the Missouri statute not only prohibits the weighing of grain by individuals, but prohibits it under a most severe penalty. Furthermore, this court, in the *Adams* case, while holding that employment agencies are subject to police regulation and control, also holds that they cannot be *prohibited*. It was urged there that the business of conducting an employment agency was subject to abuse; and it was conceded by the court that it might be so. But the court says nevertheless that "this is not enough to justify *destruction* of one's right to follow a distinctly

useful calling in an upright way." And the writer of the opinion adds:

> "Happily for all, the fundamental guarantees of the Constitution cannot be freely submerged, if and whenever some ostensible justification is advanced and the police power invoked." (244 U. S., at pp. 594-5.)

See, in this connection, pp. 41, 45-6, *supra*.

5. **The penalty provided in the Missouri law is so severe as to make the law unconstitutional on its face.**

The penalty prescribed in Section 63 is such as to discourage, if not to prohibit, individuals from employing the ordinary methods of doing business by weight or by measure, and should, for this reason alone, fall within the condemnation of the Court. In the *Stock Yard* case the Federal Supreme Court condemns a statute which, while in terms it opens the doors of the Court to a particular litigant, yet "places upon him as a penalty for a failure to make good his defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights," and declares such a statute to be "tantamount to a denial of the equal protection of the laws."

> Cotting v. Kansas City Stock Yards, 183 U. S. 79, 101 (46:92, 105).

In the above case, Mr. Justice Brewer asks:

> "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition, that, upon a failure to make good that claim or defense, the penalty for such failure either ap-

propriates all his property, or subjects him to extravagant and unreasonable loss?"

Now the Missouri statute imposes a penalty for the violation of "*any* of the acts declared to be unlawful", a penalty which might amount to a year in jail and a fine of $1000, and which, at the least, would amount to a half year in jail and a fine of $500. In view of the fact that by far the greater number of those who would actually do the weighing, and make out the certificates, are men of little means, receiving for the support of themselves and their families only day's wages, it will readily be seen that even the smallest of these penalties would be a most serious matter for such. And to such would clearly apply the language of the learned Justice in answering his question.

He says, in language particularly applicable to the case at bar:

> "Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then, even if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged *a denial of due process of law?* Of course, these are extreme illustrations, and they serve only to illustrate the proposi-

> tion that a statute (although in terms opening the doors of the courts to a particular litigant) which places upon him as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him *from asserting* that which he believes to be *his rights* is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws" (p. 101).

In *Ex parte* Young, 209 U. S. 123, a statute of Minnesota was involved, which fixed the rate for transportation of passengers, made a violation of the Act a felony, punishable by a fine not exceeding $5000, or by imprisonment for not exceeding five years, or by both such fine and imprisonment. (209 U. S., p. 129.)

It was claimed by the railroad company, in the *habeas corpus* proceeding against Young, the Attorney General of Minnesota, that, because of the enormous penalties denounced for a violation of the statute, the railway company, *its agents and servants*, were prevented from resorting to the courts for the purpose of determining the validity of the statute; that thus the railway company was denied the equal protection of the laws, and its property was taken without due process of law. (209 U. S., pp. 144-5.)

As to this branch of the case the court says:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company." (209 U. S., p. 146.)

And the court quotes from the opinion of Mr. Justice Brewer in the *Cotting* case, *supra*.

It is true that the conclusion reached by the court on this point is made to turn on the fact that the determination of the question depended upon the existence of a fact which could only be determined after an investigation of a complicated and technical character. But that is merely a difference in the facts, the principle remaining the same.

Mr. Justice Harlan dissented from the conclusion of the court on the whole case, but he did not pass upon the above question, holding that such a question was not involved, and that the only question really involved was whether an action against an Attorney General of a state was or was not an action against the state itself. (209 U. S., pp. 177-8.)

In McGahey v. Virginia, 135 U. S. 662, 694 (34:304, 314), it is held that, where the remedy for breach of a contract is changed after the contract is made, and the new remedy is "so onerous and impracticable as not only to affect, but virtually destroy, the value of the instrument in the hands" of a *bona fide* purchaser, the Act making such change in the remedy is unconstitutional.

The opinion of Mr. Justice Brewer in the *Cotting* case is also quoted with approval by Judge Lacombe, Circuit Judge of the Second Circuit, in Consolidated Gas Co. v. Mayer, 146 Fed. 150, 154; and the drastic statute passed upon in that case is held to be obnoxious to the 14th Amendment.

IV.

A remaining, and a most serious objection to the Missouri statute from a Constitutional point of view is that it directly affects Interstate Commerce, and thus infringes the provisions of Section 8 of Article 1 of the Federal Constitution.

This point is covered by the second, seventh, eighth and ninth assignments of error. In entering upon a discussion of the proposition, we shall be aided by first determining what is meant by the term "Interstate Commerce". Fortunately this court has supplied us with a definition. Mr. Justice Field, speaking for a unanimous court, says:

> "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities." (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203.)

And the court adds that the "means of transportation between the states does not change the character of the business as commerce, nor does the time within which the distance between the states may be traversed" (114 U. S. 196, 203); as, for instance, when the transportation is across the Mississippi River by ferry boat or bridge.

On this point the state court makes the following remarks in the case at bar:

> "Nor do we think these laws interfere *in a material sense* with interstate commerce. The police power of the state has full recognition by the federal government, and unless the laws passed in pursuance of such powers *unduly* interfere with

the commerce clause of the federal constitution, they have been upheld by the United States Supreme Court." Record, pp. 24-5.

Again: "These laws do not purport to regulate interstate commerce. They are made applicable *solely to citizens* of the state and property in the state." Rec., p. 25.

Then follows this quotation from the *Sherlock* case:

> "And it may be said, generally, that legislation of a state, not directed against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only *indirectly* and *remotely* affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." *Ibid.*

With all due respect to the Missouri court, we most emphatically dissent from the statement that the statute in question was made "applicable solely to citizens of the state", or to property in the state. Under the allegations of the Return, which stand admitted by the demurrer, the statute is not only made applicable to the citizens of Missouri, but to the citizens of every state in the Union in which grain is grown, or bought, or sold. It says to the growers of grain and to the dealers in grain in Kansas, Nebraska, the Dakotas, Minnesota, and the other western states, and to the purchasers in Pennsylvania, New York and Massachusetts, and other eastern markets, if you ship the grain you have sold, or bought, through St. Louis or through Kansas City, or through St. Joseph, you will be absolutely prevented from having the weight certified by the Exchange or the Board of Trade in those cities,

however valuable and however important such certificates may be. You cannot even have a citizen of Missouri, outside of the official corps of the Warehouse Commissioner, *verify* the weight reported by the Commissioner's appointee, or even write you a letter containing the information that the weight as given by the state official is correct, or is incorrect. Such acts are declared to be criminal.

We insist that this is "interfering in a *material* sense with interstate commerce"; that it affects the operation of commerce not indirectly and remotely, but directly and in a serious degree.

Referring to the passage quoted by the court below from Sherlock v. Alling, 93 U. S. (3 Otto) 99, 104 (Record, p. 25), it must be conceded, we think, that this court in that statement announced the extreme limit to which the rule has been carried. And to properly appreciate the court's position, other passages from the same opinion should be read in connection with the above. Thus the court says that upon the examination of the cases which hold that the states cannot, by legislation, place burdens upon interstate commerce, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, * * * or *prescribed conditions* in accordance with which commerce *in particular localities* or between particular places was required to be conducted. In *all* the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or *conditions for carrying it on.*" (93 U. S. 99, 102.)

The court mentions some instances illustrating the rule, among them a statute of Alabama which required

the owner of a steamer, navigating the waters of that state, to file, before the boat should leave its port, a written statement setting forth certain facts, prescribing penalties for neglecting the requirement; a case, as will be readily perceived, practically on all fours with the one at bar. This court, in condemning the Alabama statute, says:

> "It thus *imposed conditions* for carrying on the coasting trade, in addition to those prescribed by Congress."
>
> Sinnot v. Davenport, 63 U. S. (22 How.) 227, 241.

Paragraph (e) of respondent's return reads (Record, pp. 13, 14):

> "(e) Respondent further shows to the court that a large part of the grain which is inspected and weighed by the Weighing Department of respondent is grain which is shipped through St. Louis from some point in the state of Missouri destined to some point in some state other than Missouri, or is shipped from some point outside of Missouri to St. Louis or some other point in Missouri, or is shipped from some point outside of Missouri to some other point outside of Missouri, but passing through St. Louis *en route,* a large proportion of which is passed through public elevators in the city of St. Louis for the purpose, and only for the purpose, of transferring the grain from one car to another and in order to get official Merchants' Exchange weights."
>
> * * * * * *
>
> "It is commercially necessary to pass such grain through an elevator where it is elevated and weighed. Elevation consists of the unloading of grain from cars or vessels into elevators, and the reloading of the grain out into other cars or ves-

sels. *Elevation is indispensable to weighing in the elevator.* Such *weighing* is the natural, usual and only practicable method of *handling* the grain. The act of so *weighing* and so elevating, each is a necessary step in transportaion."

* * * * * *

"Furthermore, by reason of the fact that St. Louis is on the Mississippi River, the boundary between Illinois and Missouri, much of the grain coming to said market is stored in elevators in Illinois, and the Weighing Department of respondent operates not only in Missouri but also east of the Mississippi River at East St. Louis, Madison, Alton and other points in the state of Illinois. All such grain is, therefore, a part of the interstate traffic passing in the course of transportation to or through the St. Louis market, which embraces territory and warehouses on both sides of the Mississippi River, as is hereinbefore shown. In interstate shipments of grain the certification of weights and grades by respondent is essential to the protection of all parties transacting grain business in said market, and the denial of the right to persons other than state inspectors and weighers directly, and not incidentially or remotely, affects interstate commerce."

Now the state's demurrer admits the truth of all these allegations, and it says by its solemn pleading that, while they are true, they constitute no defense.

It will be noticed that the learned Attorney General is not content merely to call his pleading a demurrer. He labels it "Reply." And its opening sentence is:

"Now at this day comes the relator and demurs to the return of the respondent, *and moves for a judgment*, for the following reasons." Record, p. 14.

But, even if the facts set forth in the return were not admitted by the relator, there are matters which the court will judicially notice, which point unerringly to the conclusion that the business involved in this proceding is chiefly one between the citizens of different states. It will, we believe, be conceded by the learned Attorney General that the Missouri statute is not intended to reach or affect in any way the grain while it is in the hands of the grower, or the country dealer, or while it is going into or coming out of elevators located at any point in the state other than one of the three cities, St. Louis, Kansas City and St. Joseph. We think, further, that no one will deny that the state law was adopted for the purpose of reaching and affecting grain in large quantities, going into or coming out of elevators of the greatest capacity. And it is matter of current knowledge that the bulk of grain so going through these large elevators, when such elevators are located in either of the three largest cities, is that which is destined to the large and important markets in other states,—markets containing large mills and markets engaged in foreign trade,—and thus constitutes interstate commerce.

Moreover, we are not left to speculate as to what constitutes the transportation of grain. Both by Acts of Congress and by decisions of this court that question has been settled.

By Act of Congress *all services* in connection with the elevation of grain in course of transit are declared to be a part of the transportaion. (Act June 29, 1906, ch. 3591, 34 Stat. at L., 584; Fed. Stat. Anno. Supp. 1909, p. 256; p. 1149.)

Section one of that Act provides further that the term "transportation" shall include *all instrumentalities and facilities* of shipment or carriage, * * * and

all *services* in connection with the receipt, delivery, *elevation* and transfer in transit, ventilation, refrigeration or icing, storage and *handling* of property transported."

That the term "handling" includes weighing is shown by the admitted fact set forth in the return, that "weighing in the *natural, usual,* and *only practicable,* method of handling grain," that it is "a necessary step in transportation." (See p. 59, *supra;* Record, p. 13, near foot of page.)

These statutory provisions have been construed by the Circuit Court of Appeals and by this court.

"Elevation", says the Circuit Court of Appeals for the eighth circuit, "is a part of transportation which the law requires the carriers to provide, and for which it authorizes them to pay others reasonable compensation."

Peavey v. Union Pac. R. Co., 176 Fed. 409, 418.

Continuing the court says:

> "Railroad companies, carrying wheat out of St. Louis allow for elevation at that city 3-4 of a cent per hundred pounds on grain shipped out to the south and to the southeast, and 1-4 of a cent on grain shipped out to the east; but they allow and pay nothing for elevation upon grain shipped into St. Louis from the west." (This shows that the interstate trade of St. Louis is so extensive that it has crystallized into definite rules, known to the grain men of the country.) Complaint is made that this works a discrimination between the dealer in grain who owns an elevator at St. Louis and the dealer who owns one at Omaha. "The answer is that the two dealers are not similarly situated. The Union Pacific and the Chicago Great Western neither reach St. Louis nor have their termini there.

Their need for elevation in transit and their competition for transportation which constitute a controlling factor at Omaha and Kansas City do not exist at St. Louis, and that city is many hundred miles further distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice."

176 Fed., pp. 424-5.

On appeal of the above case, this Court said:

"To make the change (that is at the western boundary of the state of Missouri) it is commercially necessary to pass the grain through an elevator, where also it is *weighed*, another *necessary step* in the transportation."

Int. Com. Commission v. Diffenbaugh, 222 U. S., at page 43.

Continuing this court says:

"An additional consideration is that Omaha and Kansas City are *great grain markets*, where there are sales *largely in excess of local needs*, and this also requires the grain to pass through elevators at these points." (It will not be disputed that this statement is equally true of St. Louis.) "If the Union Pacific could not use these instruments of transfer, it could not compete with other roads that have through lines from the grain fields across the Missouri River to the East." *Ibid.*

Again: "Thus Congress clearly recognized that services such as those rendered by Peavey & Co. *were services in transportation.*"

Ibid., p. 45.

The above remarks apply, *mutatis mutandis*, to the St. Louis market.

In a dissenting opinion by Mr. Justice McKenna, in which Mr. Justice Hughes joins, the above facts are repeated, as follows:

> "The statute makes the term 'transportation' include all instrumentalities and facilities of shipment or carriage, and it is only when the owner of property renders services connected with such transportation, or furnishes any instrumentality used therein, that he may be compensated by the railroad." *Ibid*, p. 50.

That the authority of Congress extends to every instrumentality or agency by which commerce is carried on is also ruled in the Minnesota Rate Cases, 230 U. S., 352, 399, and Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203.

And the dissenting Justice says further:

> "I understand elevation to mean the transfer of the grain from the car of the inbound carrier, through an elevator, to the car of the outbound carrier." 222 U. S., p. 49.

The decision of the Court of Appeals in the *Peavey* case has already been cited, but we deem it proper to make one more reference to it. Judge Sanborn, speaking for the court, says that more than 90 per cent of the grain reaching the Missouri River, and stored in the elevators there, was in interstate transit. Peavey v. Union Pac. R. Co., 176 Fed. 409, 411.

And this Court has said:

> "The Chicago Board of Trade may be taken as a type of the others in existence throughout the country, because the same features exist in all of them, while the size and importance of the Chicago

institution serve only to make such features more prominent and their effect more easily discernible. We say the same features exist in all of the exchanges or boards of trade because *we have the right to consider facts without particular proof of them*, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country, and while we could not take notice, without proof, as to any particular constitution or by-law of a body of this description, yet we are *not thereby cut off from knowledge of the general nature of those bodies* and of *the manner generally in which business therein is conducted.*"

Nicol v. Ames, 173 U. S. 509, 516-17.

See, also, United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 338, as to matters of common knowledge.

"The transportation of merchandise from one state into and across another is interstate commerce, and is protected from the operation of state laws *from the moment of shipment*, whilst in transit, and up to the ending of the journey."

Rhodes v. Iowa, 170 U. S. 412, 415.

See, also, Vance v. Vandercook Co., 170 U. S. 438, 444.

Adams Express Co. v. Kentucky, 214 U. S. 218, 222.

A shipment is none the less a through shipment because it is transhipped on the way, or is passed through the elevators in St. Louis for the purpose of transferring the grain from one car to another, as is averred

in the return. (Record, middle p. 13.) It is said by the Kansas City Court of Appeals:

> "The rule may be considered as firmly established that, when a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto, and it is immaterial whether the shipment be made on a through bill of lading or upon a bill or bills issued for transportation betwen intra-state points."
>
> Bailey v. Railroad, 184 Mo. App. 457.

To the same effect are the following cases:

> Conley v. Railroad, 183 S. W. 1111;
> So. Pac. Terminal Co. v. Interstate Com. Com., 219 U. S. 498, 526-7; 55 L. Ed. 310, 320;
> Railroad Commission v. Worthington, 225 U. S. 101, 109 (56:1004, 1008);
> Texas & Pac. R. Co. v. La. Railroad Commission, 183 Fed. 1005; s. c. 229 U. S. 336, 340.

That the right of a dealer to have his grain weighed by any one whom he may choose is a common law right cannot be disputed; cannot be disputed any more than the right to send liquors from one state into another. But this Court has ruled on this latter question as follows:

> "Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress; and hence that a State law which denies such a right, or substantially interferes with or

hampers the same, is in conflict with the Constitution of the United States."

Vance v. Vandercook Co., 170 U. S. 438, 444 (42:1100, 1103).

Quoted with approval in Adams Exp. Co. v. Kentucky, 214 U. S. 218, 222 (53: at page 973).

If "a corporation manufacturing its product in New Jersey, and buying also from other manufacturers and jobbers, which ship from there to its warehouses in Massachusetts and New York from which sales are made in those states and in Connecticut, is engaged in interstate commerce", as is held in Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 50-1 (57 L. ed. 118), then it is certainly true that the respondent here, whose Weighing Department operates in the entire St. Louis market, which market embraces not only St. Louis and vicinity but also East St. Louis and its neighboring localities which are in Illinois, is likewise engaged in interstate commerce.

In view of what is urged above, as bearing on the question whether interstate commerce is affected by the state law in this case, we call attention to certain provisions among others of the Act itself, since they tend to bear out our contention in the matter. Section 28 of the Act requires that the manager of every public elevator shall make out and keep posted in the business office, a statement of the amount, kind and grade of grain in such elevator, and shall also furnish to the Commissioner a statement of the amount of each kind of grade delivered or shipped during the previous day; also how much *through grain in transit to points outside of the state* has been received for trans-shipment.

Section 49 provides that the Commissioner "shall es-

tablish a proper number and standard of grades for the inspection of grain with due regard to the prevailing usage of the markets of this state * * * and as near as may be *to conform with standards* of grain adopted *by leading markets of the United States.*"

2. **The Right to Carry on Interstate Commerce a Right, not a Franchise or Privilege.**

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States."
>
> Western Union Tel. Co. v. Kansas, 216 U. S. 1, 21;
>
> International Text Book Co. v. Pigg, 217 U. S. 91, 109.

It will not be denied by opposing counsel that, when the state granted a corporate charter to the respondent, no special privilege was conferred, in consideration of which privilege its members were forbidden to weigh, or certify the weight of, the grain which they handled. In the dissenting opinion in the *Munn* case, attention is called to the fact that "it is only where some privilege in the bestowal of the Government is enjoyed in connection with the property that it is affected with a public interest in any proper sense of the term." Munn v. Illinois, 94 U. S. 113, 146, 152. And we find the limitation well stated by Judge Cooley, which is that, "where an exclusive right exists in one's favor to compel the public to deal with him, there can be no doubt of the right of the state to compel him to deal fairly with the public." Cooley Const. Lim. (7th Ed.), p. 871.

In an earlier decision of this Court it is said:

> "The right of a citizen to carry on interstate

commerce arises from the federal Constitution; it exists wholly independent of the will of either the law-making or the executive power of the state, and does not rest on the grant of the state law; it takes its origin outside of the state and finds its support in the Constitution of the United States; whether or not it shall be exercised depends wholly upon the will of the person making the shipment, and cannot be in advance controlled or limited by the action of the state in any department of its government."

Vance v. Vandercook Co., 170 U. S. 438, 453, 455.

3. **The Missouri Statute not only affects Interstate Commerce, but it affects it injuriously; it places a burden upon it.**

What is said under the immediately preceding heads of this argument applies to a considerable extent to this point; and perhaps little more need be said regarding it. This Court has laid down a rule which must be kept in mind in such a discussion.

> "If a state enactment", says the Court, "imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress acted, but that the state his directly restrained that which, in the absence of federal regulation, should be free."

The Minnesota Rate Cases, 230 U. S. 352, 396.
See, also, Philadelphia Mail Steamship Co. v. Pennsylvania, 122 U. S. 326, 336.

The Warehouse Commissioner is, by the statute in question, given the sole right and power to weigh all the grain that goes into public warehouses in the three

cities. He has the right and the power to charge for the weighing of every bushel of grain which goes into those warehouses. No owner of grain can have that grain weighed gratuitously by any person; cannot have it weighed for any less price than what is charged by the Commissioner. Grain passing into Missouri from another state, or passing out of Missouri into another state, goes through a warehouse or elevator to be inspected and weighed. And the charge fixed on this inspection, and on this weighing, is fixed by the Commissioner, under authority of the state statute. It is difficult to see why this is not a burden on interstate commerce.

In the *Minnesota Rate Cases,* mentioned above, Mr. Justice Hughes, speaking for the Court, mentions Acts of various character which lie outside the power of the states, among them being acts "to subject the operations of carriers in the course of transportation from one state to another to requirements that are unreasonable or pass beyond the bounds of suitable local protection" (p. 401). Now here is a statute which commits to the Warehouse Commissioner the unrestricted right to fix the fees which shall be paid for the weighing of grain. (Mo. Laws 1913, p. 371, sec. 60.) Such a broad, unguarded authority committed to an official, and affecting every bushel of grain passing through the public elevators, is a burden on the interstate commerce passing to, out of, or through Missouri. Nor is it necessary to show that this authority is actually abused. The clothing of the Commissioner with arbitrary power does of itself constitute the burden.

We have not overlooked the provisions of Section 41, which section commits to the Commissioner the fixing of charges. But that section does not in any respect

limit, guard or restrict the power of the Commissioner, for he alone is to be the judge of what fees will "produce sufficient revenue to meet the necessary expenses of the *service* of *inspection* and no more." Furthermore, it will be noticed that Section 60, which empowers the Commissioner to "fix the fees to be paid for the *weighing* of grain" (Laws, 1913, p. 371), does not contain the limitation found in Section 41 relating to inspection (*Ibid*, p. 367) that the "charges shall be regulated in such manner as will, in the judgment of the Commissioner, produce sufficient revenue to meet the necessary expenses of the service." Yet Section 63 (Laws, 1913, p. 372) imposes drastic penalties upon those who assume to adopt a common method to ascertain whether the weighmaster has done his duty.

This Court has said with reference to inspection laws that they "must not substantially hamper or burden the constitutional right on the one hand to make, and on the other hand to receive, an interstate shipment."

Vance v. Vandercook Co., 170 U. S. 438, 456.

As bearing further on this point, that the hampering, or the substantial interference with, the commerce, imposes an illegal burden, see

Adams Express Co. v. Kentucky, 206 U. S. 129, 135; s. c. 214 U. S. 218;
The Minnesota Rate Cases, 230 U. S. 352, 397-99, 400-401;
Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 336.

What is said of Chicago by this Court in the *Munn* case, is a fact known not only to the Court but to all

dealers in grain in the United States and in European countries. Speaking of the Chicago elevators the Court says:

> "They stand, to use again the language of their counsel, in the very gateway of commerce, and take toll from all who pass. * * * Every bushel of grain for its passage pays a toll which is a common charge."
>
> Munn v. Illinois, 94 U. S. 113, 132.

Will this Court hesitate to take judicial notice of such facts?

The important fact that the St. Louis market embraces territory and elevators and railroads on both sides the Mississippi River must not be disregarded.

See, in this connection, the Minnesota Rate Cases, 230 U. S. 352, where it is said:

> "None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. *By their terms*, they apply solely to commerce that is *internal*. Despite this obvious purport, it has been found below that the *inevitable effect* of the state's requirements for intrastate transportation was to impose a direct burden upon interstate commerce" (p. 381; see, also, pages 382-3, 394-5).

And we respectfully insist that this remark applies with equal force to the Missouri grain law.

Under the Missouri Act, there is no question that weighers appointed by the Warehouse Commissioner are stationed at every public elevator in the City of St. Louis, as well as those of Kansas City and St. Joseph, in order to weigh grain brought into those cities, or shipped out of those cities, and that, for such weigh-

ing, the appointee collects a sum of money, fixed by the Commissioner, and which goes into the general revenue of the state. (See Section 41, page 367, of the Missouri Laws of 1913.) In view of those facts, the following remark of this Court in Brown v. Houston, 114 U. S. 622, 634, is significant:

> "We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon load of produce and merchandise brought into the city, it would not be a regulation of, and restraint upon, interstate commerce, so far as the tax should be imposed upon articles brought from other states. *We think it would be,* and that it would be an encroachment upon the exclusive powers of Congress."

And it is immaterial whether the laws or regulations were intended to burden commerce. It is enough if they so operate.

> West. Union Tel. Co. v. Kansas, 216 U. S. 1, 22, 27.

To sum up the argument on this point we merely add that the operation of the statute in such cases is easily seen and understood. As stated in the return, the reputation of the St. Louis market for accuracy and fair dealing has largely grown out of the reliability of its certificates of weight. To prevent a continuance of such practice will seriously interfere with business which now goes through the three principal cities of Missouri. A shipper from Kansas, for instance, to some point in Illinois, has his choice as to routes. He may send his grain through St. Louis or Kansas City or

St. Joseph, where he is compelled to accept the certificate of weight from the state weigher, *without any means of testing its accuracy* (see *infra*, pp. 82, 83), or he may send it through one of the surrounding states, which has no statutory provision similar to that found in Section 63. If he chooses the route which avoids Missouri, it is because the Missouri Legislature has *placed "a burden"* upon the commerce going through its three principal cities. It has "prescribed conditions in accordance with which commerce in particular articles" must be conducted, "conditions for carrying on" the commerce. So, too, the imposition of this burden may well lead a Kansas shipper to consign his grain to Chicago or to Duluth, rather than to St. Louis or Kansas City.

It follows that grain going through St. Louis elevators, and which thus constitutes a part of interstate commerce, and which the Missouri statute in the instant case *forbids* to be weighed by any person other than an appointee of the Missouri Warehouse Commissioner (Mo. Sess. Acts, 1913, Secs. 59-64), is subjected to a burden which directly interferes with the transaction of such business. For what greater burden could be imposed upon commerce than to forbid a man engaged in such commerce to take any step he may deem fit for the purpose of ascertaining the amount and quality of the grain which he puts into a public elevator as defined by the state statute?

One is necessarily impressed, when considering the cases cited above, and the many other decisions on the subject, that courts will look through all forms (West. Un. Tel. Co. v. Kansas, 216 U. S. 1, 27; Mugler v. Kansas, 123 U. S. 623, 661) to see if the operation of a state statute obstructs, or in any wise embarrasses interstate commerce, and, if it does, will pronounce the act void,

the established doctrine being (Gulf, C. & St. Fe Ry. Co. v. Ellis, 165 U. S. 150, 155-59; International Text Book Co. v. Pigg, 217 U. S. 91, 110; Woolley v. Mears, 226 Mo. 41, 50; Grossman v. Caminez, 79 App. Div. 15, 20; Starne v. People, 222 Ill. 189, 195) that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.

4. **The rule when the commerce is partly intra-state and partly interstate.**

This rule is stated by Mr. Justice Hughes in the following language:

> "When the state, in dealing with its internal commerce, undertakes to regulate *instrumentalities* which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function."
>
> Minnesota Rate Cases, 230 U. S. 352, 411.

It is held in the same case that the authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on, and that the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

> The Minnesota Rate Cases, 230 U. S. 352, 399.

Unless the commerce is completely internal, it is subject to the constitutional provision. As is said by this

Court in a very early decision (Gibbons v. Ogden), and repeated in the Minnesota Rate Cases (230 U. S. 352, 398), "the *completely internal* commerce of a state may be considered as reserved for the state itself." "But", the Court adds, "there is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." (p. 399.)

To quote again from the Minnesota case:

> "The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter." (230 U. S. 352, 399.)

So, if a statute of the state infringes the commerce clause of the Constitution, the illegality cannot be cured by including in the statute subjects which are within the jurisdiction of the state.

> Philadelphia Mail S. Co. v. Pennsylvania, 122 U. S. 326.

This Court has quite recently said that, "if the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business."

> West. Union Tel. Co. v. Kansas, 216 U. S. 1, 27.

V.

1. The enactment by Congress of the United States Grain Standards Act, adopted August 11, 1916, superseded and nullified the Missouri Grain Inspection Act, inasmuch as both statutes cover identical ground.

1. While we confidently insist that, on the grounds already urged, the judgment of the state court should be reversed, it is still true that the all-sufficient and conclusive reason for such reversal is that Congress has already acted on the subject-matter of this proceeding, in enacting the law known as the "United States Grain Standards Act", which Act completely covers the entire field, and thus wholly supersedes, nullifies and renders void, the Missouri statute now before the Court. (39 U. S. Stat. at L., p. 482.)

It will need but a cursory examination of the Act of Congress, as compared with the Missouri statute, to show that the congressional Act covers absolutely the entire subject-matter embraced in the State statute. The duties and powers of the Secretary of Agriculture, as set forth in the congressional Act, are identical with the duties and powers prescribed for, and conferred upon, the Warehouse Commissioner in the State law. There are certain duties prescribed for, and powers conferred upon, the Secretary of Agriculture which are, in the State enactment, prescribed for, and conferred upon, persons and officials other than the Commissioner. But such persons are appointees and representatives of the Commissioner; so that it may truthfully be said that those duties are performed by the Commissioner.

It is true that the Act of Congress does not in express terms provide for the weighing of grain in

connection with its inspection and transportation. That is, the specific word "weighing" or "weight" does not occur in the congressional Act. But the term "handling" or "handled" is the equivalent of "weighing" or "weight." Thus in Section 2 of the Act, it is provided "that the Secretary of Agriculture is hereby authorized to investigate the *handling*, grading and transportation of grain, and to fix and establish as soon as may be after the enactment hereof standards of quality and condition for corn (maize), wheat, rye, oats, barley, flaxseed, and such other grains as in his judgment the usages of the trade may warrant and permit." Now, whatever other acts on the part of the individuals connected with the Department of Agriculture may have to be done in connection with the inspection and transportation of grain, there can be no doubt that the weighing of the grain is included. Because, as has already been shown in this argument (see pp. 57-61, *supra*) the weighing of those various grains mentioned above is a necessary, an essential, step in inspection, grading and transportation of them.

The second paragraph of Section 7 of the congressional Act prescribes that every inspector licensed under the Act shall keep complete and correct records of all grain graded and inspected by him, and shall report to the Secretary of Agriculture the details of each inspection made by him, these details including date and place of inspection, the name of the elevator or warehouse to which the grain was delivered, or from which it was shipped, the kind of grain and the *quantity* of each kind. Now the only way in which the quantity of the grain is to be ascertained is by weighing. That is a matter of universal knowledge

with those who have anything to do with the growth or movement of, or dealing in, grain.

In the same paragraph it is provided that the Secretary of Agriculture shall publish certain facts connected with grain in the United States, including *the amount*. The section specifies "the amount and grade of grain delivered to the elevators," "the amount and grade of grain delivered from the elevators," "the estimated amount received on sample or type" and "the estimated amount delivered on sample or type."

In each of the above instances the amount of the grain can be ascertained only by weighing, as is stated above in discussing the *Peavy* case (176 Fed. 409, 411), and the *Diffenbaugh* case (222 U. S. 42, 43).

An examination of the two statutes will show further that in some respects the two are conflicting. At all events, there are certain duties which the Act of Congress imposes upon the Secretary of Agriculture which the state statute likewise imposes upon the Warehouse Commissioner. Among the chief of these is the fixing of grain standards. Section 2 of the Act of Congress makes that the duty of the Secretary of Agriculture. Section 49 of the Missouri law (Sess. Acts, 1913, p. 369), makes it the duty of the Warehouse Commissioner. So, if the Missouri law is valid and is in force, any inspector or other appointee or employee of the Secretary of Agriculture, whose duty it is to grade, or assist in grading, any grain anywhere in the state of Missouri, is labeled "an impostor," and renders himself liable to a fine or imprisonment in the county jail, or both such fine and imprisonment. (See Section 44, p. 368 of Sess. Acts, 1913.) Moreover, there is nothing to prevent the Warehouse Commissioner from fixing

standards of grain which differ from those fixed by the Secretary of Agriculture.

So, too, as to the weighing. The section upon which this prosecution is instituted, Section 63 of the Missouri Act, forbids, under most drastic penalties, anyone, whether he be an official or otherwise, so long as he is not the appointee of the State Warehouse Commissioner, to weigh any kind of grain, or to give a certificate of the weight of any kind of grain, or to give any writing whatsoever which shall state the weight of any parcel of grain, whether wagonload, railroad, carload, ship or other vessel, or sack.

The fact is that these two statutory enactments cannot possibly both be carried into effect. The contradictions, discrepancies, conflicting lines of authority and power are too extensive and too important to admit of both being valid and enforcible. Under the decisions of the Federal courts on the meaning and force of the commerce clause of the Constitution, there can be no question that the congressional Act is the one which must be pronounced valid, and the state law the one to be pronounced invalid, as being superseded and nullified by the congressional Act.

Can there be any doubt that the effect of the enactment by Congress of this law invalidates and supersedes the Missouri statute upon which this prosecution is based? This question is fully discussed by Mr. Justice Hughes in the Minnesota Rate Cases (230 U. S. 352), in which opinion he demonstrates that such must be the effect of the Congressional action. Believing, as we do, that in none of the numerous adjudications of this question has the ruling of this court been more clearly set forth, we make no apol-

ogy for quoting somewhat at length from the opinion.

The precise question involved there was, whether the State of Minnesota was deprived by the Federal Interstate Commerce Act of the right to fix by statute the rates of transportation on the intra-state railroads, regardless of its effect upon the interstate rates. It is thus stated by Mr. Justice Hughes in the early part of the opinion.

> "The complainants assailed the acts and orders upon the grounds (1) that they amounted to an unconstitutional interference with interstate commerce; (2) that they were confiscatory; and (3) that the penalties imposed for their violation were so severe as to result in a denial of the equal protection of the laws and a deprivation of property without due process of law. The jurisdiction of the Circuit Court was sustained in *Ex parte* Young, 209 U. S. 123, where it was held that the penal provisions of the acts, operating to preclude a fair opportunity to test their validity, *were unconstitutional on their face.*" (230 U. S., p. 380.)

Continuing the learned Justice says:

> "*The penal provisions being separable*, the question of the validity of the acts and orders fixing maximum rates is presented in two distinct aspects: (1) with respect to their effect on interstate commerce; and (2) as to their alleged confiscatory character." *Ibid.*

With the latter of these aspects we are not concerned at this stage of the argument, at least, and we make such extracts from the opinion as bear alone on the first, to-wit: the effect on interstate commerce.

The learned Justice proceeds, assuming, for the

sake of the argument, that the state rates were such as the state could, in the exercise of its legislative judgment, constitutionally fix, in which case it is said that the validity of the decree rendered below "rests upon two grounds: (1) that the action of the state imposes a direct burden upon interstate commerce"; (in which case it would be invalid regardless of Federal legislation) "and (2) that it is in conflict with the provisions of the Act to Regulate Commerce." (230 U. S., p. 396.)

> "*These grounds are distinct,*" says the learned Justice. "If the state enactment imposes a *direct burden* upon interstate commerce, it must fail *regardless of Federal legislation.*" (230 U. S. at p. 396.)

Continuing, it is said:

> "The general principles governing the exercise of state authority, when interstate commerce is affected, are well established. The power of Congress to regulate commerce among the several states is *supreme* and *plenary.* It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.' (Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70.) The conviction of its necessity sprang from the disastrous experiences under the confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide *effective regulation* of that intercourse as the national interest may demand. The words '*among the several states*' distinguish between the commerce which concerns more states than one and that commerce which

is confined within one state and does not affect other states. 'The genius and character of the whole government,' said Chief Justice Marshall, 'seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.' (*Id.* p. 195.) This reservation to the states manifestly is only of that authority which is *consistent with*, and not *opposed to*, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the *commingling* of interstate and intra-state operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." (230 U. S., pp. 397-399.)

Further the Court says:

"The grant in the Constitution, of its own force, that is, without action by Congress, estab-

> lished the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed *by a single authority.* (For instance, it may very well be that the grain standards fixed by the Missouri Commissioner would differ materially from those fixed by the Secretary of Agriculture.) * * * In other matters, admitting of diversity of treatment according to the *special requirements of local conditions,* the states may act within their respective jurisdictions *until Congress sees fit to act;* and when Congress does act, the exercise of its authority overrides all conflicting state legislation." (230 U. S. 399.)

It will not be denied that there is a serious conflict between the Missouri statutes governing inspection of grain, and the Federal Grain Standards Act. And nowhere does that conflict appear more prominently than in the very matter covered by Section 63 of the Missouri statute—the matter which the Attorney General has made the basis of his action against the respondent here. For the inspector, created by the Federal Act, cannot perform the duties enjoined on him by that Act, except by ascertaining the weight of the grain as to which he acts. Yet the Missouri Act declares the Federal inspector to be guilty of a crime, if he does take any step to ascertain such weight; that is, if he weighs it himself, or procures some one else to weigh it, giving any sort of written and signed memorandum showing the weight. The effect of such a state of facts is recognized and clearly stated by Mr. Justice Hughes in the following language:

> "The principle which determines this classification underlies the doctrine that the states can-

not, *under any guise*, impose direct burdens upon interstate commerce." (230 U. S., p. 400.)

See, also, Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27.

This Court will not lose sight of the construction which the state court has put upon this statute (see opinion, Record, p. 24, subd. IV), where that court says:

> "It was clearly the legislative intent to make the state the weighmaster, and *to exclude* others from giving weight tickets or certificates."

2. **The Act of Congress is exclusive and paramount.**

> "The power to regulate commerce, * * * vested in Congress, is the power to prescribe the rules by which it shall be governed—that is, *the conditions* upon which it shall be conducted; to determine when it shall be free, and when subject to, duties *or other exactions.* The power also embraces within its control all the *instrumentalities* by which that commerce may be carried on, and the means by which it may be aided and encouraged." (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203) * * * "While with reference to some of them which are local and limited in their nature or sphere of operation the states may prescribe regulations *until Congress intervenes and assumes control* of them, yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is *exclusive.*" (114 U. S. 196, 204.) See, also, Cardwell v. Bridge Co., 113 U. S. 205, 210.

Surely our contention that the regulations relating to the grading and handling of grain are "national in

their character" and "affect alike all the states," will not be disputed by the learned Attorney General. It follows that "no state enactment can be of any avail when the subject of such transactions *has been covered* by an Act of Congress acting within the limits of its constitutional powers." Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 497.

For, inasmuch as this union of states constitutes but one country, it must be subject to one system of regulations, and not to a multitude of systems.

Robbins v. Taxing District, 120 U. S. 489, 494.

The state court argues, in the case at bar, that, unless the state law, passed in pursuance of the police power, *unduly* interferes with the commerce clause of the Federal Constitution, it should be upheld. (Rec., p. 25.) But, while there are authorities which may to some extent support that ruling, this court has never lost sight of the more general and binding rule which we have set forth above, namely, that it is only where the state law is *local* and *limited* in its nature and sphere of operation that the rule applies. This court has consistently held that, if the state law is *national* in its character, and the subject-matter is such as to require *uniformity of regulation*, affecting all the states alike (see Mo. Stat., sec. 49; Laws 1913, p. 369), the power of Congress is exclusive. (Ferry Co. v. Pennsylvania, 114 U. S. 196.)

The grain coming into St. Louis goes out to every state, and to almost every country, thus absolutely *requiring* "uniformity of regulation"; and Section 49 of the Missouri statute expressly provides that the grades of grain fixed by the Warehouse Commissioner

shall conform with the standards of grade adopted by *the leading markets of the United States*, thus making the statute national in its character.

Attention has already been directed to the fact that, at the time the state court rendered its judgment, there was in force an Act of Congress which occupied the entire field of grain inspection.

"Congress," says Mr. Justice Hughes, "must be the judge of the necessity of Federal action. Its paramount authority always enables it to *intervene* at its discretion for the complete and effective government of that which has been committed to its care, and for this purpose and to this extent, in response to a conviction of national need, to *displace* local laws by *substituting* laws of its own." (Minnesota Rate Cases, 230 U. S. 352, 403.)

Long before interstate traffic had reached the immense proportions which it has now assumed, this court in the clearest terms announced the prevailing rule. In a decision rendered in 1866 it said:

> "The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for *uniform rules and national legislation*," as, for instance, grain inspection and grading; "others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. *To this extent* the power to regulate commerce may be exercised by the States."
>
> Gilman v. Philadelphia, 3 Wall. 713, 726.

In the important "*Rates*" cases, decided at the October Term, 1912, it is again said that "the Constitu-

tion necessarily excludes the states from direct control of subjects embraced within the commerce clause which are of such a nature that, if regulated at all, their regulation should be prescribed by a single authority." (The Minn. Rate Cases, 230 U. S. 352, 399.)

Under these decisions, the Missouri Act must be held to have been superseded by the Act of Congress; for there are no "varying circumstances in different localities" which would necessitate or justify giving to wheat or corn different grades according to the different localities in which they are dealt in. On the contrary, it is essential to nation wide, or world wide, dealing in grain, that the grades should be everywhere the same, a rule which, as we have seen, the Missouri Legislature followed in Section 49 of its Act. Therefore this court has at all times recognized that the "power of Congress is exclusive wherever the matter is *national* in its character, or admits of *one uniform system* or plan of regulation." (Brown v. Houston, 114 U. S. 622, 630.) And when it acts, the exercise of its authority over-rides all conflicting state legislation. (Minnesota Rate Cases, 230 U. S. 352, 400.) As is said in the *Gilman* case, cited just above:

> "Wherever commerce among the states goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."
>
> Gilman v. Philadelphia, 70 U. S. (3 Wall.) 713, 725.

The decision in the Gilman case was pronounced by a bare majority of the court. But, as to the point now under discussion, the dissentients were at one

with the majority; it being said by the writer of the minority opinion:

> "Implied admission is, that if there is an Act of Congress regulating the navigation of the river, then the right of navigation is a paramount right, and the conclusion must be that, in that event, no law of the state could afford any justification to the respondents in erecting the bridge, if it is an obstruction to that paramount right."
>
> Gilman v. Philadelphia, 3 Wall. 713, 737.

In the celebrated case of In re Neagle, 135 U. S. 1, the Court uses the following language, speaking of the power of the Federal Government under its laws:

> "This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time in the same places. The one does not exclude the other *except where both cannot be executed at the same time.* In that case the words of the Constitution itself show which is to yield: This Constitution, and all laws which shall be made in pursuance thereof, shall be the supreme law of the land. (135 U. S. at page 60) * * * While it (the United States) is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."
>
> *Ibid.*, p. 62.

Inasmuch as both the state and Federal statute confer upon the officers named certain powers and duties, what is said in Easton v. Iowa, 188 U. S. 220, is of interest and importance. That case involved the ques-

tion whether a state law, making it a criminal offense for a bank officer to receive deposits in his bank when the latter was insolvent, *was invalid* when applied to a national bank officer, as an attempt by the state to *control* and *regulate* the operations of a national bank. In the course of the opinion, which answered the above question in the affirmative, the Court says that the Federal legislation, creating and regulating national banks, "had in view the erection of a system extending *throughout the country*, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions *as various and as numerous as the States.*" (p. 229.)

The application of these remarks to the case at bar is obvious. See, in this connection the *Neagle* case, 135 U. S. 1, page 87 *supra*, and *infra*, pages 89, 90.

In re Waite, 81 Fed. 359, was a case where a United States Pension Examiner was prosecuted in a state court for acts done by him in his official capacity. The defendant was discharged on *habeas corpus*. The district judge, in the course of his opinion, said:

> "The criminal statutes of a state are not applicable to acts done within the plane of Federal jurisdiction and under the authority of the United States."

This Missouri Grain Inspection Act is a criminal statute; and the *quo warranto* proceeding of the Attorney General is based on the acts which Section 63 makes criminal. Sections 9 and 10 of the Federal Inspection Act make that also a criminal statute.

In Ohio v. Thomas, 82 Fed. 304; s. c. 173 U. S. 276, Thomas was the governor of the Soldiers' Home in Ohio, which was created by the United States and was

managed by officials appointed by the United States. Thomas failed to comply with a statute of Ohio regarding the use of oleomargarine, and was arrested and put upon trial. The court below held that the prosecution would not lie, and the state appealed to the Supreme Court, by which court the judgment of the lower court was affirmed, it being held that he was not subject to the state law. The Court says:

> "In making provision for so feeding the inmates, the Governor, under the direction of the Board of Managers, and with the assent and approval of Congress, is engaged in the internal administration of a Federal institution, and we think a state or legislature has no constitutional power to *interfere* with such management as is provided by Congress." (173 U. S., p. 282.)

And the Court added that the police power of the state has no application. (P. 283.)

In more fully explaining the above decision, the Court says:

> "We mean by this statement to say that Federal officers who are discharging their duties in a state and who are engaged, as this appellee was engaged, in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by Federal authority." (P. 283.)

The Court holds further that, in asserting this right on behalf of the United States, "the government is but claiming that its own officers, when discharging duties under Federal authority pursuant to, and by

virtue of, valid Federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed." (P. 283.)

If the law which is enacted by Congress purports to embrace the entire field covered by the state law, if it, in and of itself, provides a clear, uniform, national system for grading, handling, storing and transporting grain, then it is immaterial whether or not the two laws, state and national, conflict; a state law adopting the provisions of the congressional Act is as unconstitutional as one which conflicts with it. "Coincidence is as ineffective as opposition." Charleston, etc., R. Co. v. Varnville Furn. Co., 237 U. S. 597, 604 (59:1137, 1140).

A like view is expressed in a very early decision of this Court:

> "If Congress had passed any act which *bore* upon the case, any Act in exclusion of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, we should feel not much difficulty in saying that a state law coming in conflict with such Act would be void."
> Wilson v. Black Bird Co., 2 Peters, 245.

3. It is immaterial that the present proceeding was instituted before the enactment by Congress of the Act of August 11, 1916, since that Act was in force at the time the cause was submitted to the State Court, and at the time the judgment was rendered therein.

While it is true that the Act of Congress of August 11, 1916, had not been enacted when these proceedings

were instituted, yet it had been enacted, and was in force, before the issues were made up and before the judgment was rendered from which this writ of error is taken. In such case, as is shown under the preceding propositions, that Act of Congress nullifies the state statute, since both cannot be in force at the same time. It necessarily follows that the moment the congressional Act took effect, whether before or after the judgment had been rendered by the state court in the case at bar, there ceased to be in Missouri any state law governing the inspection and grading of grains, and the subject was controlled by the Federal statute alone.

It may be admitted that, where an individual sues to recover money under the provisions of a statute, and judgment is rendered in favor of the plaintiff, adjudging that a certain sum be awarded him, to be paid him by defendant, the repeal or amendment of the statute while defendant's appeal is pending might not help defendant or secure to him a reversal. But in the case at bar the suit is designed, not to secure a money judgment, but to determine the *status* of the defendant, and of all similar organizations in Missouri. In fact, the statute in question, and the litigation instituted by the Attorney General have for their main object the establishment of a state policy. And if, while the cause is pending, an Act of Congress is adopted which takes the vitality out of the state statute, to enforce which the suit was brought, this invalidates the judgment subsequently rendered.

Litigation involving private rights, and that involving public interests, are distinguishable, and a case of the former character may be disposed of by the court in a different manner from a case involving the

latter. In a quite recent decision this Court has presented the principle upon which this distinction rests. It says:

> "The mere dissolution of the association (defendants in the case) is not the most important object of this litigation. The judgment of the Court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed; and if such agreement be declared to be illegal, the Court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the Court, being informed of the facts, will proceed no further in the action."
>
> United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309.

This is quoted with approval in So. Pac. Terminal Co. v. Interstate Com. Com., 219 U. S. 498, 515, and it is held that this latter case is within the rule announced above.

A like question being before the Circuit Court of Appeals, there was a like ruling, because as the Court stated there, "a question of law was involved, the decision of which *might affect the future action* of the authorities."

> Boise City Irr. & Land Co. v. Clark, 131 Fed. 415.

The question remains whether the rule applies in the instant case. The contention of plaintiff in error

is that it does apply. In support of this contention we quote from Crozier v. Krupp, 224 U. S. 290, 302, where this Court says:

> "But we do not think, under the conditions which *presently* exist, we are called upon to consider the correctness of the theory upon which the Court of Appeals placed its decision, or the soundness of the contentions at bar by which that theory is supported on the one hand or assailed on the other. We reach this conclusion because, *since* October 7, 1908, when the decision of the Court of Appeals was rendered, the subject to which the controversy relates was dealt with by Congress by a law enacted on June 25, 1910." (Decided in 1912.)

The case at bar is a stronger one in favor of the plaintiff in error, because in the instant case the Act of Congress was in force before, as well as at the time of, the rendering of the judgment by the Missouri court. And it is said by Chief Justice Marshall, in a very early decision, that the trial court must decide the case according to *existing laws*.

> United States v. Schooner Peggy, 1 Cranch, 103, 110. (Decided in 1801.)

In the same case the learned Chief Justice said further that "it is in general true that the province of an appellate court is only to inquire whether a judgment, *when rendered*, was erroneous or not." *Ibid.*

Counsel in the *Krupp* case insisted that the Act of 1910 was not applicable to the case then in judgment, and that it was not controlling "because it was enacted after the bill was filed, and did not therefore retro-actively deprive the court below of the power to

afford relief under the conditions existing when the suit was commenced. In support of the contention it was urged that the subsequent statute creating a remedy at law, or removing the obstacle at law upon which the questions of the equity jurisdiction was originally founded, does not oust equity of that jurisdiction unless the statute affirmatively discloses the legislative intent to make the legal remedy exclusive.

This contention the court answered in that case by pointing out that all allegations looking to the recovery of damages, and of a right to an accounting, had been stricken out of the complainant's bill, thus leaving it purely a suit to obtain a permanent injunction against the violation of the complainant's patent. That same reason applies still more strongly to the case at bar; for the judgment of the Missouri court did not award any pecuniary compensation for any of the respondent's acts, but merely fixed the status of respondent; and not only of respondent, but of all like organizations and bodies in the three largest cities of Missouri.

However, there is in the case at bar an equally forcible and conclusive answer to the contention made in the *Krupp* case. And that is, that the enactment by Congress of the Grain Standards Act operated, *ipso facto,* as a repeal of the statute under which recovery was had by the state in the proceeding below.

An analogous question has been more than once before the courts in bankruptcy cases. The law is well settled that, since the adoption of the Federal Constitution, the states have authority to pass bankrupt laws, provided such laws do not impair the obligation of contracts, and *provided* there be *no Act of Congress*

IN FORCE to establish a uniform system of bankruptcy, *conflicting* with such law.

> Sturges v. Crowninshield, 4 Wheat. 122, 208 (4:529);
> Ogden v. Saunders, 12 Wheat. 213 (6: 606).

In Tua vs. Carriere, 117 U. S. 201, the question involved was whether the insolvent law of a state was void because, when such insolvent law was passed, there was a Federal bankrupt law in force. The Court says on this point:

> "The plaintiff in error concedes, as well he may, that if the insolvent law of Louisiana had been enacted before the passage of the bankrupt act, it would have been valid, and that the effect of the bankrupt act would have been to *suspend* it only while the bankrupt act remained in force; and, on its repeal, the insolvent law would have revived." (P. 209.)

The Court added that the repeal of the bankrupt law of 1867 vivified the state law which had in the meantime *been dormant.*

The rule has been applied to corporations existing under the National Bank acts. Comm. v. Ketner, 92 Pa. St. 372, 37 Am. Rep. 692, involved the question whether a state law with regard to embezzlement by an officer of a bank, enacted in 1860, before the adoption by Congress of the national banking act, would apply to the officers of a national bank after the Federal banking laws were enacted. The Pennsylvania court answered this question in the negative. It says:

> "The national banks are the creatures of another sovereignty. They were created, and are

> now regulated, by the acts of Congress. When our acts of 1860 and 1861 were passed, *there were no national banks,* nor even *a law* to authorize their creation."

The above view was followed in Allen v. Carter, 119 Pa. St. 192.

See, also, in this connection, Easton v. Iowa, 188 U. S. 220, 229, 231.

As we have suggested above, the principle here involved is that which underlies the rule of repeal of statutes, which rule is that, "where a later Act covers the whole subject of earlier Acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier Acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former Acts are not in all respects repugnant to the new Act." (36 Cyc, 1077-8.) So the legal effect of the National Grain Inspection Act is to repeal, so long as it remains in force, the Missouri Grain Inspection statute.

Thus, while the repeal of an Act of Congress cannot confer power on the state, it does remove a disability to its exercise which was created by the Act of Congress.

Sturges v. Crowninshield, 4 Wheat. at page 196.

It is only when the dormant power of the Constitution is awakened and made effective by appropriate legislation, that the reserved power of the state ceases to be plenary, so that its exercise in good faith can be made the subject of review by the Federal courts.

Gilman v. Philadelphia, 3 Wall. 713, 732.

And when Congress takes the particular subject-matter in hand, coincidence is as ineffective as opposition; and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go.

> Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S., 597, 604.

The rule governing this question as to the effect of a repeal was announced by this court at a very early date, and by no less a person that Mr. Chief Justice Marshall. That rule is that where, after an appeal by the claimants of a vessel from a decree condemning her, the law which created the forfeiture, and authorized the condemnation, is repealed, no sentence of condemnation can be pronounced by the appellate court. And where the repealing act makes no provision for the recovery, after the expiration of the repealed act, of penalties or forfeitures which had been incurred under the act during its existence, the law is that the penalty or forfeiture can not be enforced nor the punishment inflicted.

> Yeaton v. United States, 5 Cranch, 281. (Decided in 1809.)

The above ruling is followed in Schooner Rachel v. United States, 6 Cranch, 329. (Decided in 1810.)

See, also, United States v. Schooner Peggy, 1 Cranch, 103, 110 (decided in 1801).

It appears from the foregoing that the rule for which we contend has been recognized by this court for more than a century—from 1801 to 1912.

Conclusion.

Our contention, then, is that, inasmuch as the state

statute has been superseded by the Act of Congress, there is nothing to support the judgment below, and that, for this reason, if for no other, the cause should be reversed with directions to the state court to dismiss the proceeding.

Respectfully submitted,

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Of Counsel.

APPENDIX.

MISSOURI GRAIN INSPECTION AND WEIGHING LAW.

State Inspection and Weighing—Act Abolishing Office of Railroad and Warehouse Commissioners—Creating Office of Warehouse Commissioner.

(Laws Missouri, 1913, pages 354-373.)

AN ACT to repeal article 2 of chapter 60 of the Revised Statutes of Missouri, 1909, relating to inspection of grain and hay, and to enact in lieu thereof a new article to be known as article 2, relating to inspection and weighing of grain, abolishing the office of railroad and warehouse commissioners, creating the office of warehouse commissioner and fixing his powers and duties, with an emergency clause.

SECTION

1. Repealing and re-enacting article 2 of chapter 60 and defining the word commission.
2. Railroad and warehouse commissioners, office abolished—warehouse commissioner—office created—powers and duties.
3. Warehouse commissioner—appointment of—tenure of office—vacancy, how filled.
4. Commissioner may be removed, how.
5. Commissioner, inspectors and assistants—salaries of.
6. Commissioner—oath of office—bond.
7. Chief inspector—appointment—duties of.
8. Public warehouses—public warehousemen.
9. License for public warehouse or public elevator—issued by whom—how.

SECTION

10. Public warehousemen to give bond—schedule.
11. Transacting business without license—penalty.
12. Public warehousemen or elevatormen—duties of.
13. Grain to be inspected.
14. Grain—not to be delivered unless inspected.
15. Grain—not to be mixed by warehousemen or elevatormen.
16. Grain—may be run through machinery—when.
17. Grain—not to be received unless sufficient room.
18. Grain—not to be received and mixed until inspected and graded.
19. Warehouseman or elevatorman—not to enter into combination.
20. Receipts to be issued, when—to be numbered, how.

SECTION

21. Receipts — issuance of — general provisions for.
22. Receipts—not to limit or modify responsibility.
23. Receipt—cancellation of—upon delivery of grain.
24. Receipts—transferable by indorsement.
25. Receipts — fraudulent — penalty.
26. Receipt — presentation of — grain to be delivered.
27. Rates — schedule of — to be published—by whom.
28. Grain—grade and amount of on hand to be posted—statements of grain received, etc., to be made daily — receipts issued and canceled of grain received and delivered.
29. Not responsible for loss or damage by fire—to give notice of grain damaged—may be sold at auction, when.
30. Warehouseman or elevatorman, guilty of negligence—punished—how.
31. Commissioner to be furnished statement.
32. Printed copies of this article to be posted, where.
33. Inspectors and owners may examine all property—scales shall be examined and tested, when—by whom.
34. Violation—penalty.
35. Warehouseman or elevatorman—prosecution of — duty of prosecuting attorney.
36. Warehouseman or elevatorman—suit may be brought against—how—when.
37. Chief inspector to have general supervision of inspection department.
38. Commissioner to appoint deputy chief inspector and assistants.
39. Chief inspector — oath and bond of.
40. Deputy chief inspector and assistants — duties — report of —oath—bond—may be sued.
41. Commissioner to make rules and regulations — chief inspector, deputy and assistants to be governed by same —fees, paid where.

SECTION

43. Malfeasance of inspectors — penalty.
44. Imposters—punished, how.
45. Complaint against employees of commissioner—how made —penalty.
46. Committee — appeals may be made to for arbitration.
47. Arbitration committee — appointment of.
48. Commissioner to make rules for arbitrators.
49. Commissioner to establish grades of grain.
50. Commissioner to report to Governor.
51. Commissioner to examine and visit warehouses and elevators, when—how often.
52. Commissioner may examine all books, etc., and owners and employees.
53. Commissioner may subpoena witnesses.
54. Failure to obey subpoena—penalty.
55. Attorney-general and prosecuting attorney—duty of.
56. Prosecution to be in name of state.
57. Common law remedy—persons not to be deprived of.
58. Prosecution for damages — rights of injured person not affected.
59. Weighmasters, appointment of—duties of—to have control of scales.
60. Fees—to be fixed by commissioner — to whom paid — by whom paid.
61. Scales to be furnished — by whom—to be located, where — grain in store to be weighed—notice to be given —report.
62. Railroads to furnish scales to weigh grain handled by them —scales to be located where.
63. Weight certificates not to be issued except by bonded state weighers—false or untrue certificates given out—penalties.
64. Weighmasters — bond of — compensation.
65. Emergency.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Repealing and re-enacting article 2 of chapter 60 and defining the word commissioner.—That article 2 of chapter 60 of the Revised Statutes of Missouri, 1909, relating to inspection of grain and hay, is hereby repealed and the following new sections enacted in lieu thereof, relating to inspection and weighing of grain, abolishing the office of railroad and warehouse commissioner, creating the office of warehouse commissioner and fixing his powers and duties. The word "commissioner," when used in this act, means the warehouse commissioner hereby created.

Sec. 2. Railroad and warehouse commissioners, office abolished—warehouse commissioner—office created—powers and duties.—The office of railroad and warehouse commissioners is hereby abolished, and the office of warehouse commissioner is hereby created and established, and said commissioner shall be vested with and possessed of the powers and duties in this act specified.

Sec. 3. Warehouse commissioner—appointment of—tenure of office—vacancy, how filled.—The governor shall, by and with the advice and consent of the senate, appoint the warehouse commissioner for a term of six years, such term to begin on the date of the taking effect of this act. Upon the expiration of said term, and thereafter, a commissioner shall be appointed for four years from the time of his appointment and qualification and shall serve until his successor is appointed and qualifies. Any vacancy occurring by removal, resignation or death, shall be filled by the governor for the unexpired term.

Sec. 4. Commissioner may be removed, how.—The governor may remove the commissioner for inefficiency, neglect of duty, or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and his findings thereon, together with a complete record of the proceedings. The legislature also shall have the power, by a two-thirds vote of all members elected to each house, after ten days' notice in writing of the charges and a public hearing, to remove the commissioner from office for dereliction of duty, or corruption, or incompetency.

Sec. 5. Commissioner, inspectors and assistants—salaries of.—The annual salary of the commissioner shall be four thousand five hundred dollars. The commissioner shall fix the amount of compensation to be paid to the chief inspector, deputy chief inspector and assistant inspectors, clerks, stenographers and all other persons employed in the service of inspecting and weighing grain and prescribe the time and manner of payment: Provided, that the annual salary of the chief inspector shall not exceed $2,500; that the annual salary of the deputy chief inspector shall not exceed $2,000; that the annual salary of the supervising inspector, an assistant inspector, a registrar, a chief clerk or a clerk shall not exceed $1,800; that the annual salary of a weigher or a helper shall not exceed $1,500, and that the annual salary of a stenographer shall not exceed $1,200.

Sec. 6. Commissioner—oath of office—bond.—Be-

fore entering upon the duties of his office the commissioner shall make, subscribe to and file with the secretary of state, the following oath: "I do solemnly swear (or affirm), that I will support the Constitution of the United States and the Constitution of the state of Missouri, and that I will faithfully discharge the duties of warehouse commissioner according to the best of my ability and that I will correctly account for all moneys collected by me or coming into my hands as commissioner." The commissioner shall enter into a bond, with security, to be approved by the governor, in the sum of twenty thousand dollars, conditioned upon the faithful performance of his duty and a correct accounting of funds.

Sec. 7. Chief inspector—appointment—duties of.—It shall be the duty of the commissioner to appoint a suitable person, who shall not be a member of a board of trade, who shall not be interested, either directly or indirectly, in any warehouse, elevator or in grain merchandising in this state, who shall be a grain expert, and who shall be known as the chief inspector of grain for the state of Missouri, whose term of service as such shall continue for four years and until his successor is appointed and qualified. It shall be the duty of the chief inspector to have a general supervision of the inspection of grain, as required by this article or laws of this state, under the immediate direction of the commissioner.

Sec. 8. Public warehouses—public warehousemen.—All buildings, elevators, or warehouses, in all cities in this state having, or which may hereafter have, a population of 75,000 or more, erected or used, or which may hereafter be erected or used, for the purpose of storing or transferring grain of different owners, for

a compensation received directly or indirectly, are hereby declared public warehouses, and the person or persons, associations, copartnerships or corporations owning such building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen within the meaning of this section. (As amended by Act of March 23, 1915, Laws 1915, page 302.)

Sec. 9. License for public warehouse or public elevator —issued by whom—how.—The proprietor, lessee or manager of any public warehouse or public elevator shall be required, before transacting any business in such warehouse or elevator, to procure from the circuit court of the county in which such warehouse or elevator is situated—or if to procure license for a public warehouse or public elevator in the city of St. Louis, application shall be made to the circuit court of said city—a license permitting such proprietor, lessee or manager to transact business as a public warehouseman or public elevatorman under the laws of this state, which license shall be issued by the clerk of said court upon written application, which shall set forth the location and name of such warehouse or elevator and the individual name of each person interested as owner or principal in the management of the same; or if the warehouse or elevator be owned by or managed by a corporation, the name of the president, secretary and treasurer of such corporation shall be stated; and the said license shall give authority to carry on and conduct the business of a public warehouse or public elevator in accordance with the laws of this state, and shall be revocable by the said court upon a summary

proceeding before the court upon the complaint of any person, in writing, setting forth the particular violation of the law, to be sustained by satisfactory proof to be taken in such manner as may be directed by the court.

Sec. 10. Public warehousemen to give bond—schedule.—The person or persons receiving a license as herein provided shall file with the clerk of the court granting the same, a bond to the people of the state of Missouri, with good and sufficient security to be approved by said court, in the penal sums as per the following schedule of capacities by measurement: For a public warehouse or public elevator with a capacity of 50,000 bushels or less, two thousand five hundred dollars; for a public warehouse or public elevator with a capacity of more than 50,000 bushels and not exceeding 100,000 bushels, five thousand dollars; for a public warehouse or public elevator with a capacity of more than 100,000 bushels and not exceeding 200,000 bushels, ten thousand dollars; for a public warehouse or public elevator with a capacity of more than 200,000 bushels and not exceeding 300,000 bushels, fifteen thousand dollars; for a public warehouse or public elevator with a capacity of more than 300,000 bushels and not exceeding 400,000 bushels, twenty thousand dollars; for a public warehouse or public elevator with a capacity of more than 400,000 bushels and not exceeding 500,000 bushels, twenty-five thousand dollars; for a public warehouse or public elevator with a capacity of more than 500,000 bushels and not exceeding 750,000 bushels, thirty-seven thousand five hundred dollars; for a public warehouse or public elevator with a capacity of more than 750,000 bushels and not exceeding 1,000,000 bushels, fifty thousand dollars; for a public warehouse

or public elevator with a capacity exceeding 1,000,000 bushels, one hundred thousand dollars—conditioned for the faithful performance of his or their duties as public warehouseman or warehousemen, elevatorman or elevatormen, as security for any penalties found by due course of law for violation of any clause of this article, and his or their full and unreserved compliance with the laws of this state in relation thereto.

Sec. 11. Transacting business without license—penalty.—Any person or persons who shall transact the business of public warehouseman or warehousemen, elevatorman or elevatormen, without first procuring license and giving bond as herein provided, or who shall continue to transact such business after such license has been revoked, or such bond may have become void or found insufficient security for the penal sum in which it is executed by the court approving the same save only that he may be permitted to deliver property previously stored in such warehouse or elevator, shall be guilty of a misdemeanor and upon conviction be fined in a sum not less than one hundred dollars nor more than five hundred dollars for each and every day such business is carried on, and the court that issued may refuse to renew any license or grant a new one to any person or persons whose license has been revoked within one year from the time the same was revoked.

Sec. 12. Public warehousemen or elevatormen—duties of.—It shall be the duty of the person or persons doing a public warehouse or public elevator business under this article to receive for storage, handling or mixing, any grain that may be tendered to him or them in the usual manner with which warehouses or elevators are accustomed to receive the same in the usual

and ordinary course of business, and to not discriminate between persons desiring to avail themselves of warehouse or elevator facilities, and that the schedule of charges for such warehouse or elevator service shall be uniform, regardless of quantities or lots so offered or received.

Sec. 13. Grain to be inspected.—Receipts of grain by public warehouses in all cases shall be inspected and graded by a duly authorized inspector, and shall be stored with grain of a similar grade, received as near the same time as may be; but if the owner or consignee so requests and the warehouseman consents thereto, his grain of the same grade may be kept in a bin by itself apart from that of the general stock of the warehouse; which bin shall be marked "special," with the name of the owner and with the quantity and grade of same, and the warehouse receipt issued for same shall state upon its face that the grain is stored in a special bin, giving the number of same and the quality and grade of the grain so stored.

Sec. 14. Grain—not to be delivered unless inspected.—No grain shall be delivered from or transferred through a public warehouse or public elevator constituted by this article unless it be inspected by a duly authorized state inspector.

Sec. 15. Grain—not to be mixed by warehousemen or elevatormen.—Public warehousemen and public elevatormen shall not mix any grain of different grades together, nor select or mix different qualities of the same grade for the purpose of storing or delivering the same, nor shall they deliver or attempt to deliver grain of one grade for grain of another grade, nor in any way tamper with grain while in a public warehouse or public elevator in his or their possession or

custody, nor permit the same to be done by others with the view or result of profit to anyone; and in no case shall grain of different grades, either from the general stock or from special bins, be mixed together while in store or control of such public warehouseman or public elevatorman, except on request of the owner thereof.

Sec. 16. Grain—may be run through machinery—when.—Whenever it may be necessary, in order to preserve the condition of any bin or lot of grain belonging to any person, stored in a public warehouse or public elevator to run said grain through machinery to air, clean or otherwise improve its condition, and it is so desired by the owner, this shall be done, but in such manner as will insure the contents of each bin or lot intact, and of the same grade as when stored; but this shall not be done except under the supervision of an authorized state inspector.

Sec. 17. Grain—not to be received unless sufficient room.—Nothing in this article shall be construed so as to compel the receipt of grain into any public warehouse or public elevator in which there is not sufficient room to accommodate or store it properly, or in cases where such public warehouse or public elevator is necessarily closed.

Sec. 18. Grain—not to be received and mixed until inspected and graded.—In all places where there are legally appointed state inspectors of grain, no proprietor or manager of a public warehouse or public elevator shall be permitted to receive any grain and mix the same with grain of other owners in the storage thereof, or stored in special bins, until the same shall have been inspected and graded by such state inspector.

Sec. 19. Warehouseman or elevatorman—not to enter into combination.—No warehouseman or elevatorman, agent or manager of a public warehouse or public elevator shall enter into any combination, agreement or understanding with any railroad, steamboat, transfer or other carrying corporation, or with any person or persons by which the property of any person is to be delivered to any public warehouse or public elevator for storage or other purpose, contrary to the direction of the owner, his agent or assignee.

Sec. 20. Receipts to be issued, when—to be numbered, how.—Upon all grain received into or handled by or stored in a public warehouse or public elevator, the same being accompanied with evidence that all charges which may be a lien upon such grain, including charges for inspection and weighing, have been paid, the warehousemen or elevatormen shall forward to the office of the chief inspector, for proper registration, warehouse or elevator receipts for grain received, and shall issue to the person entitled thereto a warehouse or elevator receipt therefor, subject to the order of the owner or consignee, which receipt shall bear date corresponding with the receipt of the grain into the warehouse or elevator for transferring, handling or storing, and shall state upon its face the quantity and inspected grade of the grain and that the grain mentioned in it has been received into such warehouse or elevator for the purpose of being transferred or handled or to be stored with grain of the same grade by inspection received at about the date of the receipt, and that it is deliverable upon the return of the receipt properly endorsed by the person to whose order it was issued, and upon the payment of charges accrued for storage, handling or transferring. All

warehouse or elevator receipts for grain issued from the same warehouse or elevator shall be consecutively numbered, and no two receipts bearing the same number shall be issued from the same warehouse or elevator during any one year, except in case of a lost or destroyed receipt, in which case the new receipt shall bear date and number as the original, and shall be plainly marked upon its face "duplicate." If the grain for which receipts are issued was received for railroad cars, the number and initials of each car shall be stated in the receipt, with the amount each car contained: if by boat, barge or other vessel, the name of such craft; if from wagons or other means it shall be so stated: if having been bulked from sacks, the manner of its receipt shall be stated upon the face of such receipt for grain so received.

Sec. 21. Receipts—Issuance of—general provisions for.—No public warehouse or public elevator receipt shall be issued except upon actual delivery of grain into such warehouse or elevator from which it purports to be issued, and which is to be represented by the receipt; nor shall any receipt be issued for greater quantity of grain than was contained in the lot stated to have been received, nor shall more than one receipt be issued for the same lot of grain except in cases where receipts for a part of a lot are desired, and then the aggregate receipts for a particular lot shall cover that lot and no more. In cases where a part of the grain represented by the receipt is delivered out of such warehouse or elevator and the remainder is left, a new receipt may be issued for such remainder; but such new receipt shall bear the same date as the original, and shall state on its face that it is the balance of receipt of the original number, and the receipt upon

which a part has been delivered shall be canceled in the same manner as if the grain it called for had all been delivered. In case it be desirable to divide one receipt into two or more, or in case it be desirable to consolidate two or more receipts into one, and the warehouseman or elevatorman consents thereto, the original receipt shall be canceled the same as if the grain had been delivered from such warehouse or elevator; and the new receipts shall state on their face that they are parts of other receipts or a consolidation of other receipts, as the case may be; and the numbers of the original receipts shall also appear upon the new ones issued, explaining the change, and all new receipts issued for old ones canceled, as herein provided, shall bear the same dates as those originally issued, as near as may be.

Sec. 22. Receipt—not to limit or modify responsibility.—No warehouseman or elevatorman under this article shall insert in any receipt issued for grain received, any language in anywise limiting or modifying his responsibility or liability as imposed by the laws of this state.

Sec. 23. Receipt—cancellation of—upon delivery of grain.—Upon delivery of grain from such warehouse or elevator upon any receipt, such receipt shall be handed to the chief inspector for proper cancellation by the registrar, plainly marked across its face with the word "canceled," with the name of the person canceling the same, and shall thereafter be void and shall not again be put in circulation, nor shall grain be delivered twice on the same receipt.

Sec. 24. Receipts—transferable by indorsement.—Public warehouse or public elevator receipts for property received or handled by such warehouse or ele-

vator created by this article as herein described, shall be transferable for the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another.

Sec. 25. Receipts—fraudulent—penalty.—Any warehouseman or elevatorman of any public warehouse or public elevator, created by this article, or employe of such warehouse or elevator, or owner or manager connected with same, or any other person who shall be guilty of issuing any warehouse or elevator receipt for any property not actually in such warehouse or elevator at the time of issuing such receipt, or who shall be guilty of issuing any warehouse or elevator receipt in any respect fraudulent in its character, either as to its date or the quantity, quality or inspected grade of such property, or who shall issue a duplicate receipt without marking the same "duplicate," or who shall forge the registrar's name to an original or duplicate warehouse or elevator receipt, or who shall remove any property from such warehouse or elevator, except to preserve it from fire or other sudden danger, without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property, shall, when convicted thereof, be guilty of a felony, and in addition to other penalties prescribed by this article, may be punished by imprisonment in the penitentiary for not less than two and not more than ten years.

Sec. 26. Receipt—presentation of—grain to be delivered.—Upon the return of any warehouse or elevator receipt issued by persons in charge of a warehouse or elevator created by this article, and the de-

mand for the delivery of property represented by such receipt, duly indorsed, if not presented by the original holder, accompanied by the tender of all proper charges upon the property represented, such property shall be immediately deliverable to the holder of such receipt, and it shall not be subject to further charges for storage after demand for such delivery shall have been made, and deliveries shall be made by the warehouseman or elevatorman in the order in which such receipts are presented and demand for deliveries made.

Sec. 27. Rates—schedule of—to be published—by whom.—The manager of every public warehouse or public elevator created by this article, shall be required, within thirty days after the passage of this article, and during the first week of January of each year thereafter, to publish in one or more of the newspapers published in the vicinity in which such warehouse or elevator is situated, a schedule of rates for the transferring, handling or storing of grain in his warehouse or elevator during the ensuing year, which rates shall not be increased during the year without the consent of the commissioner and such published rates, or any published reduction of them, shall apply to all grain received into or handled by such warehouse or elevator from any person or source, and no discrimination shall be made, directly or indirectly, for or against any person in any charges made by such warehouseman or elevatorman for the transferring, handling or storing of grain. The maximum charge for the storing, transferring or handling of grain, including the cost of receiving and delivering, shall be for the first ten days or part thereof, two cents per bushel, and for each ten days or part thereof after the first ten days, one-half of one cent per bushel.

Sec. 28. Grain—grade and amount of on hand to be posted—statements of grain received, etc., to be made daily—receipts issued and canceled of grains received and delivered.—The manager of every public warehouse or elevator created under this article shall on or before Tuesday morning of each week, cause to be made out, and shall keep posted in the business office of his warehouse or elevator, in a conspicuous place, a statement of the amount of each kind and grade of grain in store in his warehouse or elevator, at the close of business on the previous Saturday, and shall also, on each Tuesday morning, render a similar statement, made under oath before some officer authorized by law to administer oaths, by some one connected with such warehouse or elevator having personal knowledge of the facts, to the commissioner. He shall also be required to furnish daily to said commissioner a correct statement of the amount of each kind of grain and grade of same received in store, transferred or handled in such warehouse or elevator on the previous day; also the amount of each kind of each grade of grain delivered or shipped by such warehouse or elevator during the previous day, and what warehouse or elevator receipts have been canceled upon which the grain has been delivered on such days, giving the number of each receipt and the amount, kind and grade of grain received and shipped upon each; also how much through grain in transit to points outside of the state, if any, may have been received for trans-shipment, for which warehouse receipts have not been issued, was so shipped or delivered, and the kind and grade of it, when and how such unreceipted grain was received. He shall also make daily report to the commissioner of receipts and deliveries of such unreceipted grain, if any,

received for the account of owners of such warehouse or elevator, either directly or indirectly, with the amount, kind and grade of same. He shall also report daily to the commissioner what receipts, if any, have been canceled and new ones issued in their stead, as herein provided for. He shall also make such further statements to the commissioner regarding receipts issued or canceled as may be necessary for the keeping of a full and correct record of all receipts issued and canceled and of grain received and delivered.

Sec. 29. Not responsible for loss or damage by fire—to give notice of grain damaged—may be sold at auction, when.—The owner of public warehouses or public elevators under this article shall not be held responsible for any loss or damage to property by fire while in their custody: Provided, reasonable care and vigilance be exercised to protect and preserve the same; nor shall they be held liable for damage to grain by heating, if it can be shown that proper care has been exercised in handling and storing the same, and that such damage was the result of cause beyond their control; but unless such public notice be given that some portion of the grain in such warehouse or elevator is out of condition or becoming so, grain of equal quality to that received shall be delivered on all receipts presented. In case, however, any warehouseman or elevatorman shall discover that any portion of the grain in his warehouse or elevator is out of condition, or becoming so, and it is not in his power to preserve the same, he shall immediately give public notice by advertisement in a daily newspaper, if one is published in the city or town in which such warehouse or elevator is situated, and by posting a notice in the most public place for such a purpose in such city or town, of its

actual condition, as near as it can be ascertained. Such notice shall state the kind and grade of the grain and give the number of the bins in which it is stored, and shall also state in such notice the receipts outstanding upon which such grain will be delivered, giving the numbers and amounts and dates of each, which receipts shall be those of the oldest dates then in circulation or uncanceled, the grain represented by which has not previously been declared or receipted for as out of condition; the enumeration of receipts and identification of grain so discredited shall embrace, as near as may be, as great a quantity of grain as is contained in such bins, and such grain shall be delivered upon the return and cancellation of the receipts so declared to represent it, upon the request of the owner thereof. Nothing herein contained shall be held to relieve the said warehouseman or elevatorman from exercising proper care and vigilance in preserving such grain after such publication of its condition; but such grain shall be kept separate and apart from all direct contact with other grain, and shall not be mixed with other grain while in store in such warehouse or elevator. In case the grain is declared out of condition, as herein provided for, and the same is not removed from store by the owner thereof within two months of the date of the notice of it being out of condition, it shall be lawful for the warehouseman or elevatorman where the grain is stored, to sell the same at public auction, for account of said owner, by giving ten days' public notice by advertisement in a daily newspaper if there be one published in the city or town where such warehouse or elevator is located. All costs incurred in the sale of said grain, storage charges, etc., to be paid from the money derived from the sale of said grain; the balance, if any, to be paid to the owner.

Sec. 30. Warehouseman or elevatorman, guilty of negligence—punished, how.—Any warehouseman or elevatorman proved guilty of any act of negligence, the effect of which is to depreciate the condition of property stored, transferred or handled in the warehouse or elevator under his control, shall be held responsible upon the bond given for such warehouse or elevator, and in addition thereto, the license given for such warehouse or elevator shall be revoked by a proceeding as hereinbefore stated.

Sec. 31. Commissioner to be furnished statement.—It shall be the duty of every owner, lessee or manager of every public warehouse or elevator in this state to furnish in writing, under oath, at such times as such commissioner shall require and prescribe, a statement concerning the condition and management of his business as such warehouseman or elevatorman.

Sec. 32. Printed copies of this article to be posted, where.—All proprietors or managers of public warehouses or public elevators in this state shall keep posted at all times, in a conspicuous place in their offices, and in each of their warehouses or elevators, a printed copy of this article.

Sec. 33. Inspectors and owners may examine all property—scales may be examined and tested, when—by whom.—All persons owning property, or who may be interested in the same, stored or handled in any public warehouse or public elevator, created by this article, and all duly authorized state inspectors of such property, shall at all times during ordinary business hours, be at full liberty to examine any and all property in any public warehouse or elevator in this state, and all proper facilities shall be extended to such persons by the warehouseman or elevatorman, his agents

and servants, for an examination; and all parts of public warehouses or public elevators shall be free for the inspection and examination of any person interested in property therein, or by any authorized state inspection of such property. All scales used for the weighing of property in public warehouses or public elevators shall be subject to examination and test by any duly authorized state scale inspector, and no scales shall be used for the weighing of grain after being found incorrect until put in order and found accurate and approved for further use by an authorized state scale inspector.

Sec. 34. Violation—penalty.—A violation of any of the preceding provisions of this article, except in cases covered by sections 11, 25 and 30, by any warehouseman or elevatorman, owner, lessee, manager or employe of public warehouses or elevators created by this act is declared a misdemeanor, and upon conviction thereof, the violator shall be fined not less than one thousand nor more than five thousand dollars, one-fourth of such fine to be awarded and paid to the informer of such misdemeanor.

Sec. 35. Warehouseman or elevatorman—prosecution of—duty of prosecuting attorney.—In all criminal prosecutions against a public warehouseman or public elevatorman for the violation of any of the provisions of this article, it shall be the duty of the prosecuting attorney of the county in which such prosecution is brought, or if in the city of St. Louis, the duty of the prosecuting attorney of said city, to prosecute the same to a final issue in the name of and on behalf of the people of the state of Missouri.

Sec. 36. Warehouseman or elevatorman—suit may be brought against—how—when.—If any warehouse-

man or elevatorman shall be guilty of a violation of any of the provisions of this article, to the injury of any person by such violation, it shall be lawful for such injured person to bring suit in any court of competent jurisdiction upon the bond of such warehouseman or elevatorman, in the name of the people of the state of Missouri, to the use of such person.

Sec. 37. Chief inspector to have general supervision.—It shall be the duty of the chief inspector provided for by this article, to have a general supervision of the inspection of grain as required by this article or laws of this state, under the advice and immediate direction of the commissioner.

Sec. 38. Commissioner to appoint deputy chief inspector and assistants.—The commissioner shall appoint such suitable persons, in sufficient numbers as he may deem qualified, for deputy chief inspector, to be acting chief inspector in the absence of the chief inspector, and assistant inspectors, who shall not be interested in any warehouse, and also such other employes as may be necessary to properly conduct the business of the grain inspection and weighing departments.

Sec. 39. Chief inspector—oath and bond of.—The chief inspector shall, upon entering upon the duties of his office, be required to take an oath that he will faithfully and strictly discharge the duties of his said office of inspector according to law and the rules and regulations prescribed by the commissioner. He shall execute a bond to the people of the state of Missouri in the penal sum of twenty thousand dollars, with sureties to be approved by the commissioner, conditioned that he will pay all damages to any person or persons who may be injured by reason of his neglect,

refusal or failure to comply with the laws and the rules an dregulations adopted by the commissioner.

Sec. 40. Deputy chief inspector and assistants—duties—report of—oath—bond—may be sued.—The deputy chief inspector and all assistant inspectors appointed under this article, shall be under the supervision of the chief inspector, to whom they shall report in detail all services performed by them at the close of each working day. The deputy chief inspector and each assistant inspector shall take the same oath as the chief inspector, and execute a bond in the penal sum of ten thousand dollars, with like conditions and to be approved in like manner as provided for the bond of the chief inspector, which bonds shall be filed in the office of said commissioner. Suit may be brought upon bonds of either the chief inspector, deputy chief inspector or assistant inspectors, in any court having jurisdiction thereof, in the county or city where the defendant resides, for the use of any person injured by any act of said chief inspector, the deputy chief inspector or assistant inspectors.

Sec. 41. Commissioner to make rules and regulations—chief inspector, deputy and assistants to be governed by same—fees, paid where.—The chief inspector of grain, the deputy chief inspector, assistant inspectors and other employes in connection therewith, shall be governed in their respective duties by such rules and regulations as may be prescribed by the commissioner, and the said commissioner shall have full power to make all proper rules and regulations for the inspection of grain, not inconsistent with this article, to include the fixing of charges for the inspection of grain and other duties of said chief inspector, deputy chief inspector and assistant inspectors, and to make rules

for the collection of same, which charges shall be regulated in such manner, as will in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the service of inspection, and no more. All fees collected shall be paid monthly into the state treasury and become a part of the general revenue fund of the state, the earnings of each month to be paid into the said treasury on or before the 20th day of the month following the one during which such fees were earned.

Sec. 43. Malfeasance of inspectors—penalty.—Any duly authorized chief inspector, deputy chief inspector or assistant inspector of grain under this article, who shall be guilty of neglect of duty, of who shall knowingly or carelessly inspect or grade any grain improperly, or who shall accept any money or other valuable consideration, directly or indirectly, for any neglect of duty as such chief inspector, deputy chief inspector or assistant inspector, or any person who shall improperly influence any chief inspector, deputy chief inspector or assistant inspector of grain, under this article, in the performance of his duties as such inspector, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, the jail of said city, not less than six nor more than twelve months, or be punished by both such fine and imprisonment, in the discretion of the court.

Sec. 44. Imposters—punished, how.—The inspection or grading of grain in this state, whether into or out of warehouses, elevators, or in cars, barges, wagons or sacks, arriving at or shipped from points where

state grain inspection is established, must be performed by such persons as may be duly appointed by the commissioner, sworn and have given bond under this article, and any person or persons who shall assume to act as an inspector of grain who has not been duly appointed by the commissioner, sworn and given bond under this article, shall be held to be an imposter, shall be guilty of a misdemeanor and upon conviction thereof, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail, and if in the city of St. Louis, in the city jail of said city, for not less than three months nor more than six months, or by both such fine and imprisonment, at the discretion of the court, for every such offense so committed.

Sec. 45. Complaint against employees of commissioner—how made—penalty.—Upon complaint in writing of any person, to the said commissioner, supported by satisfactory proof, that any person appointed or employed by said commissioner, under the provisions of this article, has violated any of the rules prescribed for his government, or has been guilty of any improper official act, or has been found incompetent for the duties of his position, such person shall be removed from his employment by the same authority that appointed him, and his place shall be filled, if necessary, by a new appointment. When it shall be deemed necessary to reduce the number of persons appointed or employed their terms of service shall cease under the orders of the same authority by which they were appointed or employed.

Sec. 46. Committee—appeals may be made to for arbitration.—In all matters involving doubt on the part of the chief inspector, the deputy chief inspector,

or any assistant inspector, as to the proper inspection into or out of any warehouse or elevator created by this article, or in case any owner, consignee or shipper of grain or any warehouse or elevator manager, shall be dissatisfied with the decision of the chief inspector, the deputy chief inspector or any assistant inspector, in matters pertaining to inspection, an appeal may be made to the committee hereinafter provided for, who shall at once convene, and whose decision, after a careful inquiry into the questions at issue, shall be final.

Sec. 47. Arbitration committee—appointment of.—The commissioner shall, as soon after the passage of this article as is practicable, appoint a committee for the adjustment of differences between inspectors and warehousemen or elevatormen, owners, or representatives of owners of grain, arising from the acts of inspectors—each committee to consist of three persons well known as experts in grain; and a committee shall be appointed in each city or town where public warehouses or public elevators under this article are located, said committee to be known as the arbitration committee of the warehouse commissioner.

Sec. 48. Commissioner to make rules for arbitrators.—The commissioner shall make equitable and legal rules governing said committees' procedure in the arbitration, the manner and amount of compensation, the method of appointment and terms of service.

Sec. 49. Commissioner to establish grades of grain.—The commissioner shall establish a proper number and standard of grades for the inspection of grain, with due regard to the prevailing usage of the markets of this state, and the interests of both producers and dealers, and as near as may be to conform with stan-

dards of grades adopted by leading markets of the United States: Provided, no modification or changes of grade shall be made, or any new ones established, without public notice being given of such changes, at least thirty days prior to the date that such changes shall take effect, by officially notifying the secretaries of all boards of trade in this state, and such secretaries are required to post the notification of such change or changes on the floor of the exchange; and provided further, that no mixture of old or new grades, even though designated by the same name, or distinction, shall be permitted while in store, except as in this article provided.

Sec. 50. Commissioner to report to Governor.—The commissioner shall, on or before the first day of January of each year, make a report to the governor of his doings for the preceding year, to contain such facts as will disclose the actual working of the system of the warehouse business of this state, as contemplated by this article, and such suggestions thereto as to him may appear pertinent.

Sec. 51. Commissioner to examine and visit warehouses and elevators, when—how often.—Said commissioner shall examine into conditions and management and all matters concerning the business of warehouses and elevators under this article, in this state, so far as the same may pertain to the relations of such warehouses or elevators to the public, and to the security and convenience of persons doing business therewith, and to ascertain whether the officers, directors, managers, lessees, agents and employees comply with the laws of this state now in force, or to be in force, concerning such warehouses or elevators. Whenever it shall come to his knowledge, or he shall have reason

to believe, that any law governing the public warehouses or elevators of this state under this article, is being or has been violated, he shall cause to be prosecuted or prosecute all persons guilty of such violation. To enable said commissioner to efficiently perform his duties under this article it is hereby made his duty, at least once in six months, to visit each warehouse or elevator in this state and personally inquire into the management of such warehouse or elevator business.

Sec. 52. Commissioner may examine all books, etc., and owners and employees.—The property, books, records, accounts, papers and proceedings of all such warehousemen or elevatormen as are contemplated by this article, shall at all times during business hours be subject to the examination and inspection of the commissioner, and he shall have power to examine, under oath, any owner, manager, lessee, agent or employee of a public warehouse or public elevator, and any other person concerning the condition and management of such warehouse or elevator.

Sec. 53. Commissioner may subpoena witnesses.—In making any examination, as contemplated by this article, or for the purpose of obtaining information as contemplated by this article, said commissioner shall have the power to issue subpoenas for the attendance of witnesses and may administer oaths. In case any person shall willfully refuse to obey such subpoena, it shall be the duty of the circuit court of any county, if in St. Louis, the circuit court of said city, upon application of said commissioner, to issue an attachment for such witness and compel such witness to attend before the commissioner and give his testimony upon such matters as shall be lawfully required by such commissioner; and the said court shall have power

to punish for contempt, as in other cases, of refusal to obey the process and order of such court.

Sec. 54. Failure to obey subpoena—penalty.—Any person who shall willfully neglect or refuse to obey the process of subpoena issued by said commissioner, and appear and testify as therein required, shall be guilty of a misdemeanor, and shall be liable to arraignment and trial in any court of competent jurisdiction, and on conviction thereof shall be punished for each offense by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment of not more than thirty days, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

Sec. 55. Attorney-general and prosecuting attorney —duty of.—It shall be the duty of the attorney-general and the state's attorney in every county, if in cases brought in St. Louis, the state's attorney for said city, or on request of said commissioner, to institute and prosecute any and all suits or proceedings which they, or either of them, shall be directed by said commissioner to institute and prosecute for a violation of this article or any law of this state concerning public warehouses or public elevators, as constituted by this article, or the officers, employees, owners, operators or agents of such warehouses or elevators.

Sec. 56. Prosecutions to be in name of state.—All prosecutions under this article shall be in the name of the people of the state of Missouri, and all moneys arising therefrom shall be paid into the state treasury by the sheriff or other officer collecting the same: Provided, this article shall not be construed so as to prevent any person entitled to receive a percentage of fines imposed and collected, as a reward for informa-

tion furnished as hereinbefore stated, which percentage shall be paid to such person by the officer collecting such fine.

Sec. 57. Common law remedy—persons not to be deprived of.—Nothing in this article shall deprive any person of any common law remedy now existing.

Sec. 58. Prosecution for damages—rights of injured person not affected.—This article shall not be construed so as to waive or affect the right of any person injured by the violation of any law in regard to warehouses or elevators, from prosecuting for his private damages, in any manner allowed by law.

Sec. 59. Weighmasters, appointment of—duties of —to have control of scales.—The commissioner shall appoint suitable persons to act as weighmasters at such places in this state where state grain inspection and weighing may be established in conformity with the provisions of this article; said weighmasters shall at the places aforesaid supervise the weighing of all grain which may be subject to inspection and weighing, and at all warehouses or elevators where there are no such scales as hopper scales, there shall be provided in such case, by the warehouseman or elevatorman or railroad company, upon the order of the commissioner, track or other proper scales upon which the gross, tare and net weight of each car, wagon or other package shall be taken, but at all warehouses or elevators having hopper scales, the net weight of grain contained in each car, wagon or other package, shall be taken on such scales and certificate of weight of such weighmaster, in the discharge of their aforesaid duties, shall be prima facie the basis of settlement between the buyer and seller. And such state weighmaster shall have the entire control of such scales.

Sec. 60. Fees—to be fixed by commissioner—to whom paid—by whom paid.—The commissioner shall fix the fees to be paid for the weighing of grain, which fees shall be paid by the warehouseman or elevator-man, but on grain not going into such warehouse or elevator the fee shall be paid by the consignee, and may be added to the charges for storing, transferring, handling, mixing or commission, and the said commissioner shall adopt such rules and regulations for the weighing of grain as he shall deem proper.

Sec. 61. Scales to be furnished—by whom—to be located, where—grain in store to be weighed—notice to be given—report.—It shall be the duty of the person or persons doing a public warehouse or public elevator business under this article to provide and maintain suitable scales upon which all grain tendered to him or them for storage, transferring, handling or mixing shall be weighed under the supervision of a state weighmaster, as provided for in this article. Said scales shall be located at the most convenient point upon the track of some railroad running into or adjoining such warehouse or elevator. It shall further be the duty of the person or persons doing a public warehouse or public elevator business under this article, at some convenient time, at least once a year, or when the commissioner orders it, after giving fifteen days' notice, and under the supervision of an authorized state weighmaster and inspector of the state grain inspection department, to weigh and inspect all grain at such time or times then in such warehouse or elevator, and to report to the warehouse registrar the result of such weighing and the actual amount of each kind and grade in such warehouse or elevator. During such time as such weighing is going on, the receiving and shipping of grain into

and from such warehouse or elevator shall be discontinued until such general weighing has been completed.

Sec. 62. Railroads to furnish scales to weigh grain handled by them—scales to be located where.—At all terminal, or other points within this state, wherever state grain inspection may be established, it shall be the duty of all railroads to provide, on the order of the commissioner, suitable wagon scales in their unloading yards, upon which all grain handled by them, subject to inspection and weighing, may be weighed as required by this article. Said scales shall be located at places to be designated by the commissioner and it shall be the duty of said commissioner to see that the provisions of this article are strictly enforced.

Sec. 63. Weight certificates not to be issued except by bonded state weigher—false or untrue certificates given out—penalties.—It shall be unlawful for any person, corporation or association, other than a duly authorized and bonded state weigher, to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain, weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation, who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail, or if

in the city of St. Louis, the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment. And any weighmaster who shall knowingly falsely weigh any grain, or shall knowingly give any false or untrue certificate as to the weight of grain, or who shall knowingly violate any of the provisions of this article, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, in the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment.

Sec. 64. Weighmasters—bond of—compensation.—The weighmasters provided for in this article shall each give a bond in the sum of five thousand dollars, conditioned for the faithful discharge of their duties and shall receive such compensation as the commissioner shall determine.

Sec. 65. Emergency.—There being no adequate provisions of law for state inspection and weighing of grain, as provided for herein, and this act being deemed of immediate importance, an emergency exists within the meaning of the Constitution; therefore this act shall take effect and be in force from and after the fifteenth day of April, 1913.

Approved March 20, 1913.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918

MERCHANTS EXCHANGE OF ST. LOUIS,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI AT THE RELATION OF JOHN T. BARKER, ATTORNEY GENERAL,
Defendant in Error.

No. 25,739

REPLY TO BRIEF OF DEFENDANT IN ERROR.

In the brief of the learned Attorney-General, he discusses most of the points advanced by plaintiff in error in its brief and argument, but lays special strength upon two propositions, one of which strikes at the root of the defense. Those points are:

First, that plaintiff in error has no standing in any court to set up the defenses advanced in its brief; and, *Second*, if it has any standing in court, it is barred from taking advantage of the Act of Congress relating to the handling of grain and its inspection.

(a) The ground upon which the Attorney General places his contention that we have no standing in court is that the plaintiff in error has no power to engage in commerce of any kind, interstate or intrastate, and it has no power to do any weighing, or certificate the weighing, and is, therefore, not harmed by a decree forbidding it to do so.

Organizations of this character—Merchants Exchanges, Boards of Trade, Commissions of various kinds,—exist throughout the country and have existed for a long time in all the large cities and in many of the smaller cities. If it be that such a body cannot set up such defenses as are considered in the brief of plaintiff in error, the result is that all these bodies throughout the United States are helpless to insist upon any rights which its individual members could insist upon, with the necessary result that the organization would be practically wiped out of existence.

It does not need any argument, we apprehend, to satisfy the Court that these various organizations in fact represent the interests of the members. The members of the exchange are deeply interested in the matters discussed here; for it is the purpose of the existence of plaintiff in error to furnish its members the best facilities for the transaction of business. It is the members who benefit by the inspection and weighing that are done in St. Louis. It is the members who will be injured if the judgment of the state court in this case is affirmed. And, inasmuch as the thousand or more members of such an organization cannot individually sue to enforce their rights, or be sued, in case of their liability to action of any nature, unless the organization, the corporation, can sue or be sued, justice cannot be done.

On page 6 of the defendant in error's brief, Article II, of the Charter of the plaintiff in error is set out. The learned Attorney General prefaces this excerpt by the statement: "Its charter rights, powers and purposes, express and implied, are the only rights, powers and purposes which it possesses. These charter rights, powers and purposes, derived from the state, are expressed in its Articles of Association as follows:" Then follows Article II. That article states that the purposes of the corporation shall not be to conduct any business whatever for pecuniary profit (that is, profit to the body itself), but "generally to advance, promote and extend the commercial and manufacturing *interests of St. Louis and vicinity.*" Another of the purposes mentioned in the article is "to avoid and amicably adjust, as far as practicable, any controversies or misunderstandings arising between *individuals engaged in trade.*" And the final clause of the article reads: "And finally and particularly *to facilitate in every proper way* the transaction of all legitimate business *between members,* or *between them and others.*"

Now it is a well-known fact that in the dealing with grains of the various kinds, there is nothing so likely to give rise to controversies and misunderstandings as the correct and proper grade which is to be affixed to specific quantities of grain and as to the due and proper weight of grain dealt in by the members, going into the elevators and delivered from them. So that, when the plaintiff in error in this case established a Weighing Bureau in order that the members might be able to have adjusted any misunderstanding or controversy arising as to the weight of any specific shipment of grain, we insist that plaintiff in error was

acting fully within its charter rights and powers. It was for that purpose that the plaintiff in error adopted the Rules and Regulations set out in its return, and which will be found on pages 6 *et seq.* of the Record in this case.

Moreover, it appears by the return of the plaintiff in error that Article III of its Articles of Association, that is, of its charter, authorized the plaintiff in error to adopt Rules and Regulations. One of the rules adopted under this power reads as follows:

> "The Board of Directors is fully authorized and empowered to establish and maintain a Department of Weights under such rules, regulations and conditions as the Board may deem necessary and proper, the purpose and intent being to secure the accurate and correct weighing and method of weighing of all property handled by members of the Merchants Exchange and others requesting the service." (See Rule IV, Section 10, page 14.)

Record, foot p. 6.

Of course, the demurrer of the Attorney-General constituted an admission of the correctness of the above averments.

(b) The second point made by defendant in error is that the plaintiff in error is barred from raising the question whether the above mentioned Act supersedes and nullifies the state law. The effect of the law we shall briefly discuss on a subsequent page. But here we need only call attention to the fact that the Attorney-General is mistaken when he states that "such error was not assigned in the application of plaintiff in error for the writ in this case." The assignment of errors which accompanied the application for the writ will be found on pages 27 and 28 of the record.

We contend, and we believe that it cannot be successfully contradicted, that the first assignment of error is sufficiently broad to cover this matter. The second assignment also, which specifies Section 63 as being invalid, covers any ground which tends to show that that section, as well as the whole Act, is invalid. Under the sixth and seventh assignments it is, as we contend, entirely within the record to show that Congress has occupied the field of the state law by the passage of the above mentioned Act, and that consequently the state law was superseded. Again, the powers of Congress in this matter are set forth in Section 8 of Article I of the Federal Constitution, and the Grain Standards Act became, immediately upon its enactment and by virtue of that section, the supreme law and the plenary law. Therefore, it was entirely germane to the subject-matter under discussion to show that the state law has been thus superseded.

And it makes no difference, it is utterly immaterial, whether the enactment of the congressional law worked a practical repeal or only a suspension of the state law. Its effect was to destroy the force of the state law during the time that the Federal Act was and is in existence. It is still in full force and valid, and its effect upon the state law in question is properly set forth in the brief of plaintiff in error.

The Effect of the Enactment of the Federal Statute.

While we believe, notwithstanding what the learned Attorney General says on page 15 of this brief, that it is not essential to our position that the two laws, State

and Federal, should conflict in essential respects, and while we stand upon what we have said on page 90 of our original brief, that coincidence is as ineffective as opposition, yet we insist that if it is essential to show conflict between the two laws, such conflict appears in the case at bar. We ask leave to add to the Authorities Cited on page 90 the following:

> Southern Ry. Co. v. Reid, 222 U. S. 424, 442;
> Same v. same, 222 U. S. 444.

And, in the first place, as to the contention of the Attorney General that the two laws do not cover the same field: the State law purports to be a law "relating to inspection and weighing of grain." (See first page of the Appendix page 99 of the Plaintiff in Error's Argument.) Examination of the body of the Act shows that it appoints a Commissioner for the State of Missouri who shall have charge of the inspection, storage and weighing of grain, with power to fix the standards of grain dealt in within the confines of the State, and to appoint persons who shall do the inspecting and weighing within the State; who shall also fix the salaries and wages to be paid his appointees. Section 44 of the Act provides that the inspection or grading of grain, "whether into or out of warehouses, elevators or in cars, barges, wagons or sacks, arriving at or shipped from points where State grain inspection is established, must be performed by such persons as may be duly appointed by the Commissioner, sworn and have given bond under this article." Then the same section penalizes "any person or persons who shall assume to act as an inspector of grain who has not been duly appointed by the Commissioner, sworn and given bond under this article," and

declares that such person "shall be held *to be an imposter,* and shall be guilty of a misdemeanor."

Therefore every inspector appointed under the federal act is, under the state law, an "*imposter.*"

The law also (Secs. 59-63) provides for persons to do the weighing, and its penal section, Section 63, is set out in our brief on pages 5 and 129.

Now we contend that the very same ground is covered by the Congressional Act in question. That Act covers the fixing of standards of grain, the handling, grading and transportation of grain, and its inspection. As stated in our original brief, the specific word "weigh" or "weighing" is not found in the Act, but, as is shown in our original brief, not only does the word "handling" include weighing, but weighing is an essential step in the transportation, storage and inspection of grain. (See Brief of Plaintiff in Error, pages 58, 60, 76, 77; see, also, the use of the term "handling" by the court below in the extract from its opinion in the brief of defendant in error, on page 11.) And the same word "handling" necessarily includes such certificates of weight as become necessary for the orderly transaction of business. Moreover, as is stated in our brief, the transportation of merchandise in interstate commerce "is protected from the operation of State laws from the moment of shipment, whilst in transit, and up to the ending of the journey." (See Brief of Plaintiff in Error, p. 63.)

We are making this point now only for the purpose of showing that the field covered by the Congressional Act is the same as that covered by the State law.

The Attorney General suggests that it is only the certificating of weight that is forbidden by the State statute. But in this he is evidently mistaken. The

issuance of certificates of the weight is only a detail which could properly be left to the Commissioner, or, with equal propriety, be mentioned in the statute. Certainly the term "handling," used in the Act of Congress, taken in connection with the requirement to keep "*complete and correct records,*" specifying what the record shall contain, includes the statement of the quantity certified, whether going into or out of elevators, which must necessarily be obtained from the weight. (See Section 7, paragraph 2, of the Act of Congress.) The decree of the State court is specifically directed to the *weighing*, as well as to the certifying. The language is:

> "Said respondent be, and is hereby, ousted of its usurped power of *weighing grain* received into or discharged from public warehouses and elevators in the city of St. Louis, and making charges therefor," etc. See Record, p. 16.

The Attorney General makes the further suggestion (see his Argument, p. 31), that the Federal Act makes no provision "for protecting the public in the matter of weights." We submit that the Act, as a whole, especially Section 7, does, if faithfully administered, furnish such protection.

To the further contention of the Attorney General that the Missouri law "is the exercise of a reserved power" (see his Brief, p. 31), we reply that it is only the *completely* internal commerce which may be considered as reserved for the state. (See our Argument, p. 74.)

What Is to Be Understood by the Term "Conflict"?

We apprehend that it does not necessarily mean that what is directed in one law to be done should be expressly forbidden in the other, though that is the case in Section 7 of the Act, the section relating to licenses. If the effect of exercising the powers conferred in one Act makes it probable, or possible, that the exercise of the powers granted by the other would be rendered impossible, or even difficult or confusing, there is such a conflict that the one supersedes the other.

This is well illustrated in the case at bar. The Secretary of Agriculture has the power to so define the grades of grain as to make them substantially different from those fixed by the Warehouse Commissioner. This would necessarily create confusion, both in cases where the transaction is intrastate and where it is interstate. In such a matter the possibility of conflict would be almost as serious an evil as its actual occurrence.

Again, by the State Act, appeals go to a Committee appointed by the Commissioner, and the Commissioner is empowered to make rules to govern the procedure of that Committee. (Secs. 47, 48.) While under the Federal Act the appeal goes to the Secretary, who is to cause an investigation to be made and tests to be applied, under rules and regulations prescribed by him. (Secs. 5 and 6.) Both of these provisions can not be operative at the same time.

Our case is pre-eminently one in which the commerce clause should have full effect. It affects the farmers and dealers in grain throughout the United States. Wheat, corn, oats, barley and other grains are almost universally the subjects of Interstate Commerce. The

grades fixed, and the method of determining the grade of any particular lot, must be uniform. These grains are shipped from and into every state in the union. And the utmost confusion would follow if every state had the power to fix its own grades. The power to appoint the man whose decisions as to whether or not any particular lot is properly graded should be limited to one authority. The only authority in the instant case is Congress, because Congress alone can act for all the states. It was this consideration which led the makers of the Constitution to adopt the Commerce Clause.

And the above is what we mean when we say that the Federal Act covers the entire field.

The case is one in which persons handling grain expose themselves to penalties, whichever law they follow. For the one law forbids what the other requires. (See Sections 9 and 10 of the federal act and Sections 44 and 63 of the state law.) To use the language of this Court in another case:

> "If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law."
>
> Southern Ry. Co. v. Reid, 222 U. S. 424, 442.

The point as to the Federal Act was sufficiently made in the state court.

As to the point urged by the defendant in error that the effect of the enactment of the United States Grain Standards Act was not presented to the State court, our reply is substantially the same as that which we

made to the objection of defendant in error that there was no assignment of error covering that point. (See pages 4, 5, *ante.*)

We contend that the Record clearly shows that by our defense we attacked the validity of the State law. And what we urge in support of that defense is the said Act of Congress; an Act which covers the ground, as we have shown in our original brief. Of this Act the State court was bound to take judicial notice.

> Papin v. Ryan, 32 Mo. 21, 24;
> Woods v. Nortman, 85 Mo. 298, 301.

As bearing upon this question whether it must appear that the point was raised in the court below, we ask attention to a case cited on page 93 of our Argument, the case of Crozier v. Krupp, 224 U. S. 290, where the Federal law was enacted not only after the judgment was rendered in the trial court, but after the decision of the appeal by the Circuit Court of Appeals. Of course, it goes without saying that the point had not been raised in either of the lower courts.

This question came again before this court at its October Term, 1918, the opinion having been handed down on November 4, 1918, and was not published until after our brief had been printed and served on our opponent. For that reason a reference to the decision does not appear in our original brief. The point decided is presented in the following paragraph of the opinion:

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such *disposition* of the case as justice may *at this time* require. Butler v. Eaton, 141 U. S. 240, 35 L. Ed.

713, 11 Sup. Ct. Rep. 985; Gulf, C. & S. F. R. Co. v. Dennis, 224 U. S. 503, 506, 56 L. Ed. 860, 861, 32 Sup Ct. Rep. 542. And in determining what justice *now* requires, the court must consider the *changes* in fact and *in law* which have *supervened since* the decree was entered below." (Followed by a number of citations, all of which fully support the text.)

Watts, Watts & Co., Ltd., v. Unione Austriaca Di Navigazione, etc., Adv. Ops. U. S. Sup. Ct. (Oct. Term, 1918), page 1.

Appendix to Brief of Defendant in Error.

The Attorney General has submitted an Appendix to his Argument, purporting to show statutes and ordinances of various states and cities providing for inspection and weighing of various commodities. But he has not claimed that any statute or ordinance makes it a crime for a person, *in addition* to the official weigher, to weigh such commodity, or to give a certificate *in addition* to the official weigher's certificate.

Respectfully submitted,

PERCY WERNER,
Attorney for Plaintiff in Error.

EVERETT W. PATTISON,
Of Counsel.

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No. 116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

MERCHANTS EXCHANGE OF ST. LOUIS, Plaintiff in Error,
vs.
THE STATE OF MISSOURI at the Relation of JOHN T. BARKER, Attorney-General.

No. 25739.

BRIEF OF DEFENDANT IN ERROR.

FRANK W. McALLISTER,
Attorney-General of Missouri,
JOHN T. GOSE,
Assistant Attorney-General of Missouri,
For Defendant in Error.

HUGH STEPHENS JEFFERSON CITY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

MERCHANTS EXCHANGE OF ST. LOUIS, Plaintiff in Error, vs. THE STATE OF MISSOURI at the Relation of JOHN T. BARKER, Attorney-General.	No. 25,739.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This case is here upon writ of error to the Supreme Court of the State of Missouri.

As disclosed by the record in this case, the errors assigned by plaintiff in error were:

"1st ASSIGNMENT OF ERROR.

"The said Supreme Court of Missouri erred in holding to be valid and constitutional the Act of the Legislature of Missouri approved March 20, 1913, entitled 'An Act to repeal Article 2 of Chapter 60 of the Revised Statutes of

Missouri, 1909, relating to inspection of grain and hay, and to enact in lieu thereof a new article, to be known as Article 2, relating to inspection and weighing of grain, abolishing the office of Railway Warehouse Commissioners creating the office of Wharehouse Commissioner and fixing its powers and duties with an emer-gency clause.'

"2nd ASSIGNMENT OF ERROR.

"The said Supreme Court of Missouri erred in holding to be valid and constitutional Section 63 of the Act above mentioned approved March 20, 1913.

"THIRD ASSIGNMENT OF ERROR.

"The said Supreme Court erred in holding that said Act and that the said Section 63 of said Act did not, nor did either of them, interfere either with the petitioner's liberty, or its right of contract, or its right to enjoy the gains of its industry, and did not either of them deprive it of liberty and property without due process of law all in violation of the 14th amendment to the Constitution of the United States.

"4th ASSIGNMENT OF ERROR.

"The said Supreme Court erred in not holding that said Act and Section 63 of said Act, was an unreasonable exercise of the police power, and therefore violative of said 14th amendment to the Constitution of the United States.

"FIFTH ASSIGNMENT OF ERROR.

"The said Supreme Court erred in not holding that said Act and especially Section 63 thereof, denied to petitioner the equal protection of the laws accorded to it by the said 14th Amendment to the Constitution of the United States.

"6th ASSIGNMENT OF ERROR.

"The said Supreme Court erred in holding that the said Statute was not an illegal and improper interference with Interstate Commerce and with the Interstate Commerce clause of the Constitution of the United States.

"7th ASSIGNMENT OF ERROR.

"The said Supreme Court erred in holding that the said State of Missouri, in the enactment of said Act did not infringe upon the powers of Congress and the rights given to Congress by Section 8 of Article I of the Constitution of the United States, and did not impose a burden on Interstate Commerce in violation of said Section."

Printed Transcript of Record, pp. 27, 28.

While the above assignments of error cover in a general way the Missouri Grain Inspection Act, the controversy is centered upon Section 63 of such Act, which is as follows:

"Section 63. It shall be unlawful for any person, corporation or association other than a duly authorized and bonded state

> weigher to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail, or if in the city of St. Louis, the jail of said city, not less than six months nor more than twelve months, or by both such fine and imprisonment."

Laws 1913, p. 372.

Plaintiff in error contends here, as it unavailingly contended below, that such statute is invalid because:

First—It is repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, relating to "equal protection of the laws," "privileges and immunities" and "due process of law."

Second—It is not a proper and legitimate exercise of the police power reserved to the State.

Third—It imposes a burden upon interstate commerce and infringes the power of Congress relating

thereto, in violation of Section 8 of Article I of the Constitution of the United States.

We contend that the Supreme Court of the State of Missouri rightly held:

First—That it was a valid exercise of the police power reserved to the State.

Second—That it in no sense was repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, relating to "equal protection of the laws," "privileges and immunities" and "due process of law."

Third—That the statute did not affect or place a burden upon interstate commerce, nor infringe the powers of Congress relating thereto, in violation of Section 8 of Article I of the Constitution of the United States.

We further contend that the question of whether or not such statute places a burden upon interstate commerce or infringes the powers of Congress relating thereto, is not properly before this Court in this case. This is true because plaintiff in error is not engaged in interstate commerce in any sense. Such objection to the constitutionality of the Missouri statute can be raised only by someone who is engaged in the business of interstate commerce.

A great part of the argument presented by plaintiff in error assumes that it is an individual possessed of certain natural, inherent and inalienable rights, and in the exercise of those rights is engaged in interstate commerce. In view of this, it may be well to keep in mind that plaintiff in error is a creature of the State of Missouri. Its charter rights, powers and purposes, express and implied, are the only rights, powers and purposes which it possesses.

These charter rights, powers and purposes, derived from the State, are expressed in its articles of association as follows:

"ARTICLE II.

> "The purposes of the corporation hereby created shall not be to conduct any business whatever for pecuniary profit, but generally to advance, promote and extend the commercial and manufacturing interests of St. Louis and vicinity; to inculcate just and equitable principles of trade; to establish and maintain the utmost fairness and uniformity in commercial usages; to acquire, preserve and disseminate valuable information; and to avoid and amicably adjust, as far as practicable, any controversies or misunderstandings arising between individuals engaged in trade; and finally and particularly, to facilitate in every proper way the transaction of all legitimate business between members or between them and others."

Printed Transcript of Record, p. 6.

Not only is plaintiff in error not engaged in interstate commerce, but it has no power so to engage even if it so willed. Whatever, under such charter rights, it may do to advance, promote and extend the commercial interests of St. Louis and vicinity; to inculcate just and equitable principles of trade; to establish and maintain the utmost fairness and uniformity in commercial usages; to acquire, preserve and disseminate valuable information; to avoid or amicably adjust any controversy or misunderstanding arising between

individuals engaged in trade, or to facilitate the transaction of all legitimate business between members or between them and others, such action on its part cannot be held to constitute interstate commerce or any part thereof.

The assignment of errors set out in the brief of plaintiff in error includes the following:

> "The Court below erred in failing to rule that the Missouri statute was superseded and nullified by the Act of Congress of August 11, 1916, known as the United States Grain Standards Act."

Plaintiff in Error's Brief, p. 16.

This assignment of error appears *for the first time* in plaintiff in error's brief filed in this Court, page 16. This point was never raised, or in any manner presented to the Supreme Court of Missouri. It is not found among the assignments of error in the transcript of this case. Not having been presented to, or passed upon by, the Supreme Court of Missouri, and not having been assigned as error in the record brought to this Court, the point is not before this Court for review.

But if this point were before this Court for determination, we would contend that the United States Grain Standards Act does not nullify or suspend the Missouri Act, but specifically and expressly recognizes the existence and continuance in force of all such state acts.

We contend, moreover, that, independent of the express recognition given state laws in the United States Grain Standards Act, the two acts can be reconciled and consistently stand together. The United States Grain Standards Act carefully limits the issuing of the certificate to show quality or grade. There is no

authority to certify as to weights. It fixes the standard as to grade, but leaves the States free to certify as to weights.

And further, if the supremacy of the United States Standards Act did suspend this exercise of a reserved power by the state, the state statute would be suspended only to the extent that it affects interstate commerce, and would remain in full force and effect as to intrastate shipments of grain admittedly weighed, certified and charged for by plaintiff in error.

POINTS AND AUTHORITIES.

I.

The Missouri Grain Act, having a real or substantial relation to the object to be accomplished, and not being a purely arbitrary interference with lawful business transactions, but necessary or needful for the protection of the public and the promotion of the general welfare, does not violate the Fourteenth Amendment of the Consittution of the United States.

House v. Mayes, 219 U. S. l. c. 282, 284.
Broadnax v. Missouri, 219 U. S. l. c. 293;
Budd v. New York, 143 U. S. l. c. 544, 548;
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Munn v. Illinois, 94 U. S. l. c. 123-135;
Noble State Bank v. Haskell, 219 U. S. l. c. 111;
Erie R. v. Williams, 233 U. S. 685.
Citizens Telephone Co. v. Fuller, 229 U. S. 322.

Plaintiff in error "has no such constitutional right to carry it on at will as to raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination."

Engel v. O'Malley, 219 U. S. l. c. 136.

Liberty of making contracts is subject to conditions in the interest of the public welfare.

Erie R. v. Williams, 233 U. S. 685.

> "We do not perceive that any right secured by the Fourteenth Amendment is or has been thereby violated. We could not adjudge otherwise without declaring that the statute was so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions."
> Broadnax v. Missouri, 219 U. S. l. c. 293.

Neither the rights or privileges nor the losses or deprivations of warehousemen and elevatormen or shippers, buyers and sellers of grain are before this Court, since plaintiff in error is not, and has no power to be a warehouseman or elevatorman of a shipper, buyer or seller of gain.

> Citizens Nat'l Bank v. Kentucky, 217 U. S. l. c. 453, 454;
> Austin v. Alderman, 7 Wall. 694;
> Supervisors v. Stanley, 105 U. S. 305;
> Hatch v. Reardon, 204 U. S., l. c. 160;
> So. Ry. Co. v. King, 217 U. S. 534;
> Engel v. O'Malley, 219 U. S. 135;
> Aluminum Co. v. Ramsey, 222 U. S., l. c. 256;
> Hartford Fire Ins. Co. v. Perkins, 125 Fed., l. c. 505-6.

II.

The Missouri statute is a valid and constitutional exercise by the State of its police power.

> Pittsburg v. Louisiana, 156 U. S. 591;
> House v. Mayes, 219 U. S. l. c. 282, 284;
> Munn v. Illinois, 94 U. S. l. c. 125;
> Budd v. New York, 143 U. S. l. c. 544;

Brass v. Stoeser, 153 U. S. l. c. 404;
Noble State Bank v. Haskell, 219 U. S. l. c. 111;
Erie R. v. Williams, 233 U. S. 685;
Coal Co. v. St. Louis, 130 Mo. 323;
City v. Elsner, 155 Mo. 671;
German Alliance v. Kansas, 233 U. S. 389.

"In fact, the act undertakes to so hedge in the handling of grain in these public warehouses and elevators, as to prevent all kinds of frauds. It so hedges the warehouse receipts that frauds upon banks and other persons loaning money are protected. The whole purport of the act is for such official supervision in the principal grain markets as will protect not only the buyers, but the sellers of grain. In other words, it establishes a disinterested agency between the buyer and seller both as to weights and grades of the grain. If a wheat grower of Missouri ships a car of wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators), but he has the protection of the disinterested agency established by the State, an agency duly bonded for faithful performance of duty. If a Missouri miller desires to purchase a car of grain he has the same protection. If after grain is stored in an elevator, a Missouri banker desires to loan money upon the property, he has the assurance that it has been fairly graded and weighed, and the further assurance that not only is the grain there, and of the quality stated, but

that only one elevator receipt is out for that particular grain. To say that these laws do not tend to the public welfare would be a travesty upon the law."

State ex inf. v. Merchants Exchange, 269 Mo. l. c. 358.

"It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. . . . . If then the legislature of the State thinks that the public welfare requires the measure under consideration, anology and principle are in favor of the power to enact it."

Noble State Bank v. Haskell, 219 U. S. l. c. 111.

"That the inspection and regulation of weights and measures are within the police power of the States, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto, and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulation and not repugnant to the Constitution of the United States or of this State can no longer be doubted. (Pittsburg Coal Company v. Louisiana, 156 U. S. 590; 30 Am. and Eng. Ency. Law

(2 Ed.), 451 and cases therein cited.) Legislation along these lines is found in almost every country, the underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective and uncertain weights and measures and fraudulent practices connected therewith." House v. Mayes, 227 Mo. l. c. 636.

The penalties prescribed by the act are not of such a character as to affect its validity, but if they were plaintiff in error could not attack the validity of the act on that ground, since this is not a suit to enforce such penalties, but is a quo warranto proceeding independent of the statutory penalties. Moreover, no penalty of fine or imprisonment was imposed upon plaintiff in error, and it is in no position to complain of the statutory penalties prescribed by the act.

Grenada Lumber Co. v. Miss., 217 U. S., l. c. 442, 443;
Citizens Nat'l Bank v. Kentucky, 217 U. S., l. c. 453, 454;
Austin v. Alderman, 7 Wall. 694;
Supervisors v. Stanley, 105 U. S. 305.
Wilson v. New, 243 U. S. 332, 354.

III.

This Missouri statute does not regulate or directly affect interstate commerce within the meaning of Section 8 of Article I of the Constitution of the United States.

Pittsburg Coal Co. v. Louisiana, 156 U. S. 590;
Budd v. New York, 143 U. S. l. c. 545;
Turner v. Maryland, 107 U. S. 38;
Broadnax v. Missouri, 219 U. S. l. c. 294, 295;

Brass v. Stoeser, 153 U. S. l. c. 404;
Sherlock v. Alling, 93 U. S. 99;
State ex inf. v. Merchants Exchange, 269 Mo. l. c. 365;
Ware v. Mobile County, 209 U. S. 405;
Smith v. Alabama, 124 U. S. 465;
Munn v. Illinois, 94 U. S. 113.
Foote v. Maryland, 232 U. S. 494, 503.

> "But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." Hopkins v. U. S., 171 U. S. l. c. 597.

Moreover, plaintiff in error not being engaged in interstate commerce, nor having any right, authority or power to so engage, does not come within the class of persons entitled to attack the act as unconstitutional on the ground that it is in violation of Section 8 of Article I of the Constitution of the United States, relating to interstate commerce.

Hatch v. Reardon, 204 U. S. l. c. 160;
So. Ry. Co. v. King, 217 U. S. 534;
Engel v. O'Malley, 219 U. S. 135;
Aluminum Co. v. Ramsey, 222 U. S. l. c. 256;
Hartford Fire Ins. Co. v. Perkins, 125 Fed. l. c. 505-6;
Boradnax v. Missouri, 219 U. S. 285, 294, 295.
Hall v. Geiger-Jones 242 U. S. 539, 554.

IV.

The Missouri statute would not be superseded or suspended by the United States Grain Standards Act, unless the two acts could not be reconciled or consistently stand together.

Reid v. Colorado, 187 U. S. 137, 148;
Sinnott v. Davenport, 22 How. 227, 243;
Savage v. Jones, 225 U. S. 501, 533;
Missouri v. Harris, 234 U. S., 412, 419;
12 Corpus Juris, Sec. 15, p. 17;
L. R. A. 1915, E., 942;
Missouri v. Haber, 169 U. S. 613;.
42 LRANS, 984.

> "It should never be held that Congress intends to supersede, or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' "
>
> Reid v. Colorado, 187 U. S. 148.

The United States Grain Standards Act expressly recognizes the existence and subsequent establishment of state grain inspection departments, and provides that

the persons duly authorized and employed to inspect and grade grain under the laws of such states shall be licensed by the Secretary of Agriculture.

39 U. S. Stats. at L., p. 484, Sec. 7.

Under this act of Congress the licensed inspector is authorized to issue a certificate as to grade, quality or condition only. The act does not cover, or attempt to cover, the subject of weights.

39 U. S. Stats. at L., p. 482, Sec. 2; p. 484, Sec. 7.

If the act of Congress and the Missouri statute were in conflict, the effect would not be to repeal the Missouri statute or render it invalid. The Missouri act would merely be suspended while the Federal statute was in force, and then suspended only to the extent that it affected interstate commerce. It would automatically revive on the repeal of the Federal statute.

12 Corpus Juris, p. 18;
Houston v. Bright, 156 S. W. 304;
Missouri v. Turner, 138 S. W. 1126, 1128;
Henderson v. Spofford, 59 N. Y. 131.

The question of the effect of the United States Grain Standard Act not having been raised below, and not having been in any manner presented to or passed upon by the Supreme Court of the State of Missouri, and not having been included in the assignments of error specified in the record in this case, the Supreme Court of the United States will not consider such question upon this writ of error to the Supreme Court of Missouri.

Revised Statutes U. S., Secs. 997, et seq.;

Rules of the Supreme Court of the United States, Sec. 35;

Southwestern Oil Co. v. Texas, 217 U. S. 114;

Wood v. Wilbert's, 226 U. S. 384;

Briscoe v. Rudolph, 221 U. S. 547;

Behn v. Campbell, 205 U. S. 403.

ARGUMENT.

INTRODUCTION.

The following propositions are, upon principle and repeated pronouncements by this Court, so well established that we deem it necessary to do no more than state them:

First—The police power of a state of the Union is an inherent and unsurrendered power. It is not derived from, but exists independently of the Federal Constitution.

Second—It is through the exercise of this power that the legislature of a state enacts regulations for the protection of the public and the promotion of the common good.

Third—The legislature, in the first instance, is the judge of what is necessary or needful for the protection of the public and the promotion of the common good, and its judgment will not be reviewed by this Court unless "unmistakably and palpably in excess of legislative power."

Fourth—With the wisdom or expediency of an enactment adopted by the state under its police power, this Court will not concern itself.

Fifth—An enactment, under the police power of a state, for the common good, will not be held to violate any right secured by the Fourteenth Amendment unless such enactment is "so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions."

Sixth—"The earnest conflict of serious opinion" affords no ground for declaring a legislative enactment unconstitutional. All doubt is to be resolved in favor of the constitutionality of such enactment.

I.

FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

Turning to the brief of plaintiff in error, page 30, we find a quotation which purports to show the construction of the section in question, by the State court, as follows:

> "The statute will not bear such a construction. It was clearly the *legislative intent* to make the state the weighmaster, *and to exclude others* from giving weight tickets or certificates. *The very purpose of the law* would be thwarted in the construction sought." Rec. p. 24.

In justice to the Supreme Court of the State of Missouri, plaintiff in error should have added the remainder of the paragraph, which is as follows:

> "Of course the law in no way prohibits owners of grain from weighing their grain before it is sent to or put in a public warehouse, to the end that they may know what they have, nor does it prohibit such owners from weighing it after it is withdrawn. So that the argument that no opportunity is afforded to have evidence to refute the prima faci-showing of the state's certificate of weight, is without foundation. By this we do not mean that such owners may force such pre-

> vious or subsequent weighing upon scales provided for by the law for the use of the state authorities. The state authorities are entitled to proceed with their work without hindrance, or interference in any respect.

Printed Trans. of Rec., p. 24.

In short, the prohibitions of the statute are limited to the weighing and certifying the weights of grain *weighed at public warehouses* where state weighers are in control. In its argument, plaintiff in error ignores the limitations, and treats the statute as an absolute prohibition of the business of weighing grain at any and every place.

Plaintiff in error then states his first contention as follows:

> "1. The position of plaintiff in error is that said Section 63 denies to a certain class, namely, dealers in grain, the equal protection of the laws; also deprives *dealers in grain* of life, liberty and property without due process of law; also abridges the privileges and immunities of said persons as citizens of the United States. For these reasons the state statute comes within the prohibition of Section 1 of the 14th Amendment ot the Federal Constitution." Plaintiff in Error's Brief, p. 31. (Italics ours.)

The proposition as stated is really foreign to this case, because the plaintiff in error is not a *dealer in grain* in any sense.

As to the contention that the statute relating to the weighing of grain constitutes an arbitrary division into the classes repugnant to the equality of right

required by the Federal Constitution, we merely say that, in view of the numerous cases in this and state courts, upholding laws relating to the inspection of grain, such contention cannot be given serious consideration. If its contention were true, all laws relating to the inspection and weighing of grain would be unconstitutional.

Next, plaintiff in error takes up the question of personal and private rights protected by the Fourteenth Amendment of the Federal Constitution.

The Fourteenth Amendment to the Constitution of the United States has done valiant service in the preservation of personal liberty and private rights, but it was never intended, nor has it been by this Court construed, to prohibit the exercise of the police powers by the state in enactments necessary and needful for the protection of the public and the promotion of the common good. This amendment does not raise one above, or place him out of the reach of, laws enacted by the state under its police power: it stands aloof so long as the laws enacted by the state, under its police power, are necessary and needful for the general welfare. It can be invoked against laws enacted under the police power of the state only when such laws are "manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious, in discrimination." Engle v. O'Malley, 219 U. S. 128, 136.

> ".....; for the liberty of contract which that instrument protects against invasion by the state is subject to such regulations of the character just stated, as the state may establish for the protection of the public and the promotion of the general welfare. If such state regulations are not unreasonable, that is, not simply arbitrary nor

beyond the necessities of the case, they are not forbidden by the Constitution of the United States. We so adjudge on both principal and authority." House v. Mayes, 219 U. S., l. c. 284, 285.

"We do not perceive that any right secured by the 14th Amendment is or has been thereby violated. We could not adjudge otherwise without declaring that the statute was so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions. We are unwilling to so adjudge. Much was said at bar about the 'liberty of contract.' In a large sense every person has that liberty. It is secured by the provision in the Federal Constitution, forbidding a state to deprive any person of liberty property without due process of law. But the Federal Constitution does not confer a liberty to disregard regulations as to the conduct of business which the state lawfully establishes for all within its jurisdiction." Broadnax v. Missouri, 219 U. S., l. c. 293.

We might add that plaintiff in error is not an individual with inherent and natural rights, but is a creature of the State of Missouri, and possessed of very limited powers. Moreover, the Constitution of the State of Missouri, Section 5, Article XII, provides:

> "The exercise of the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

II.

Plaintiff in error's contention that the statute is not a legitimate exercise of the police power of the State, Plaintiff in Error's Brief, pages 41 to 54, is fully and carefully answered by the opinion of the State court. After frankly stating that the Missouri grain inspection laws were invalid unless they were enacted under the police power of the State, the Supreme Court of the State of Missouri, in the language of Honorable W. W. Graves, then Chief Justice, said:

> "To determine whether or not these grain inspection laws, including the weight and certificate provisions thereof, are a proper exercise of the police powers, we should have the provisions thereof clearly in mind, and then say whether or not such provisions tend toward the general welfare.
>
> "The act defines a public warehouseman and elevatorman, and public warehouses and elevators, and establishes the office of Warehouse Commissioner. It further provides for the grading and weighing of all grain into the public warehouses or elevators, and for the keeping of such grain in the grades so established.
>
> "Expert grain inspectors are to be employed to grade the grain, and weighmen employed to weigh the grain into the warehouses and elevators. If controversy arises either as to weights or grades a disinterested committee settles the same.
>
> "These officers are bonded for the faithful performance of duty. Warehouse receipts can

only be given for grain actually weighed into the warehouse according to the grading and weighing of these public officers, and such receipts must be registered in the department of the Warehouse Commissioner. These receipts must be numbered consecutively and no two receipts from one warehouse shall be of the same number during the space of any one year. When grain is delivered upon a receipt, the receipt must be given over to the proper officer of the State for cancellation. The issuance of receipts without the grain is made a crime. In fact, the act undertakes to so hedge in the handling of grain in these public warehouses and elevators, as to prevent all kinds of frauds. It so hedges the warehouse receipts that frauds upon banks and other persons loaning money are protected. The whole purport of the act is for such official supervision in the principal grain markets as will protect not only the buyers, but the sellers of grain. In other words, it establishes a disinterested agency between the buyer and seller both as to weights and grades of the grain. If a wheat grower of Missouri ships a car of wheat to St. Louis, he is not forced to take the grading and weighing of the defendant (an association of grain dealers and speculators), but he has the protection of the disinterested agency established by the State, an agency duly bonded for faithful performance of duty. If a Missouri miller desires to purchase a car of grain he has the same protection. If after grain is stored in an elevator, a Missouri banker desires to loan

money upon the property, he has the assurance that it has been fairly graded and weighed, and the further assurance that not only is the grain there, and of the quality stated, but that only one elevator receipt is out for that particular grain. To say that these laws do not tend to the public welfare would be a travesty upon the law. Thirty-five states of the Union have laws similar to these laws, although they may effect different commodities. Many of them are gray from age." Printed Trans. of Rec. pp. 19, 20; State ex inf. v. Merchants Exchange, 269 Mo. l. c., 357, 358.

Quoting from the case of House v. Mayes, 227 Mo., l. c. 636, affirmed 219 U. S. 270, the Court further said:

" 'That the inspection and regulation of weights and measures are within the police power of the States, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto, and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulations and not repugnant to the Constitution of the United States or of this State can no longer be doubted. (Pittsburg Coal Company v. Louisiana, 156 U. S. 590; 30 Am. and Eng. Ency. Law (2 Ed.) 451 and cases therein cited.) Legislation along these lines is found in almost every country, the underlying purpose of which is to secure uniform weights and measures and to guard the people at large against defective

and uncertain weights and measures and fraudulent practices connected therewith.'

"I thought the statute involved in the House case entrenched upon private contracts, and dissented with all the vigor I possessed, but only succeeded in getting two of my brothers to see the light as I saw it. The case went to the U. S. Supreme Court, and if I recollect aright my dissent had less effect there. Authorities from other jurisdictions are along the same lines. The purpose of state weighers is to get fair weights for all parties concerned. The purpose of certificates of weights being filed with the warehouse commissioners' department is clearly apparent from the outline of the law which we have given. Such requirement protects the public from more than one angle. We have no doubt that under our rulings, to some of which we have not agreed, these statutes are valid." Printed Trans. of Rec., pp. 21, 22; State ex inf. v. Merchants Exchange, 269 Mo., l. c. 360, 361.

Since the Court below referred to other states of the Union as having similar legislation, we thought it might be well to add as an appendix hereto a citation of some of the laws of the States, from which may be gathered something of the antiquity, necessity and extent of state legislation relating to the weighing and inspection of grain and other commodities. Appendix, page 36.

In view of the opinions of this Court, as expressed in cases of House v. Mayes, 219 U. S. 270; Munn v. Illinois, 94 U. S. 113; Pittsburg v. Louisiana, 156 U. S.

591; Budd v. New York, 143 U. S. 517, and other cases cited in our brief, it seems unlikely that this Court will hold the Missouri statute to be "unmistakably and palpably in excess of legislative power," or "that it is manifestly unfit to accomplish the supposed end and greatly in excess of the need," or that is is a "purely arbitrary interference with lawful business transactions."

Under this point plaintiff in error singles out for attack the penalty clause of said Section 63. The maximum punishment is a fine of one thousand dollars and imprisonment in the jail for a period of twelve months. We do not know of any case decided by this Court or any state court, holding that a similar penalty, under like circumstances, rendered a statute unconstitutional.

Plaintiff in error's argument, as to "men of little means," is entirely beyond the point. "Men of little means" are not before this Court in this case.

But if the statute were objectionable on account of the penalty clause, such objection could not be raised by plaintiff in error, because this is not a proceeding to recover statutory penalties. It is a quo warranto proceeding for ouster because of usurpation of powers. In such a proceeding a fine might have been imposed, but it would not have been a statutory penalty, but an incident of the quo warranto proceeding. As a matter of fact, no monetary penalty was adjudged by the court below. The question of excessive penalties cannot be injected into this case, much less statutory penalties which were never invoked. Granada Lumber Co. v. Mississippi, 217 U. S., l. c. 442.

III.

Under Point IV, Plaintiff in Error's Brief, pages 54 to 75, there is a very comprehensive argument relating to the commerce clause of the Federal Constitution. The argument, however, is not applicable to the instant case, and we wish to answer by quoting the clear and concise language of the Supreme Court of the State of Missouri upon this point:

> "V. Nor do we think these laws interfere in a material sense with interstate commerce. The police powers of the State has full recognition by the Federal government, and unless the laws passed in pursuance of such powers unduly interfere with the commerce clause of the Federal Constitution they have been upheld by the United States Supreme Court. (Pittsburg Coal Co. v. Louisiana, 156 U. S. 590; Sherlock v. Alling, 93 U. S. 99; Munn v. Illinois, 94 U. S. l. c. 135; Turner v. Maryland, 107 U. S. 38.)
>
> "These laws do not purport to regulate interstate commerce. They are made applicable solely to citizens of the State, and property in the State. In the Sherlock case, supra, the U. S. Supreme Court well said:
>
> " 'And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or

> water, or engaged in commerce, foreign or interstate, or in any other pursuit.'
>
> "What has been said by the courts with reference to elevation of grain in transit being a part of the transportation, and therefore the rates charged, under the control of the Interstate Commerce Commission, are foreign to questions involved here. This contention is therefore ruled against the respondent." Printed Trans. of Rec. pp. 24, 25; State ex inf. v. Merchants Exchange, 269 Mo. l. c. 365.

Plaintiff in error's argument and cited cases are not to the point for the further reason that such argument and cases are applicable only to persons engaged in interstate commerce. Plaintiff in error does not buy, sell or ship grain, and is in no sense engaged in interstate commerce. It is not within the class entitled to invoke the commerce clause of the Federal Constitution. Before it can contest the constitutionality of the Missouri act on the ground that it violates the commerce clause of the Federal constitution, it must bring itself within the class engaged in interstate commerce.

> "We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional." Plymouth Coal Co. v. Penn., 232 U. S., l. c. 544.

The objection urged by plaintiff in error, that the Missouri law is invalid because the Commissioner is authorized to fix the fee for weighing, is not well taken.

The Missouri act limits the charges to "necessary expenses of the service," and the authorization of the Commissioner to fix the fee under such restriction and limitation is perfectly legitimate. Merchants Exchange v. Knott, 212 Mo., l. c. 632 to 636. Moreover, plaintiff in error is not shown to be within the class which pays fees, and is, therefore, in no position to attack the constitutionality of the statute on such ground.

IV.

We come now to the final contention of plaintiff in error which relates to the effect of the United States Grain Standards Act, Plaintiff in Error's Brief, pages 75-98.

In the beginning of the argument it is said of this act: "which act completely covers the entire field, and thus wholly supersedes, nullifies and renders void the Missouri statute now before the Court," and that said act "covers absolutely the entire subject matter embraced in the State statute."

We cannot agree with these statements. An examination of Section 2, page 482, 39 U. S. Statutes at Large, discloses that the Secretary of Agriculture is authorized to *investigate* the handling, grading and transportation of grain *for the purpose of establishing standards of quality and condition* thereof. He is not authorized to weigh, or issue any certificates of weight whatever. The whole act is confined to fixing a standard of quality and condition, and the inspectors are given no authority to certify to anything other than the standard or condition fo the grain. No where in the act is an inspector authorized to issue certificates of weight to buyers, sellers or shippers of grain. The act does not purport to protect the public in any manner

whatever as to weights. The only place in the act where weights are mentioned is in the report made by the inspectors to the Secretary of Agriculture to show the amount of the grain.

That Congress did not intend this act to abolish state grain inspection departments is perfectly clear from the fact that in Section 7 of said act it expressly recognizes the eqistence and subsequent establishment of state grain inspection departments, and provides that such state employees shall be licensed by the Secretary of Agriculture. It is the plain intention of the act to limit itself to the matter of standards, and to utilize state grain inspection departments with their authorized weighers of grain. If it had intended to cover the subject of weights, it would have made some provision for protecting the public in the matter of weights, by providing for the issuance of certificates thereof.

The Missouri act in question is the exercise of a reserve power, and the law announced by this Court as applicable in such cases is as follows:

> "In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of reserve power, the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together."
>
> Reid v. Colorado, 187, U. S. 137;
> Quoted with approval in Savage v. Jones, 225 U. S., at page 537.

We adopt the language of the Oklahoma Supreme Court in the case of Railroad v. Beatty, which, after

quoting the above, discusses the two cases cited, and says:

> "Will the act of Congress 'be frustated and its provisions be refused thier natural effect' by enforcing the act of Oklahoma? Can it be said that 'the act of Congress, fairly interpreted, is in actual conflict with the law of the state?' Is there such a 'repugnance or conflict' 'that the two acts could not be reconciled or consistently stand together?' We think these questions must all be answered in the negative."
>
> Railroad v. Beatty, 42 L. R. A. N. S., l. c. 991.

Moreover, plaintiff in error is in error in regard to the effect produced when Congress legislates upon the same subject. In such case the state statute is not repealed. It is merely suspended, and revives upon the withdrawal of the Congressional act. Consequently arguments based upon cases determining the validity of a judgment rendered after a statute has been repealed would not be applicable, even in cases where a state act had been suspended by Congressional action covering the entire subject.

Again, the state act would be suspended by the supremacy of a Congressional act only to the extent that such state statute affected interstate commerce, and plaintiff in error would still remain subject to ouster by reason of its intrastate weights and certificates.

> "If it should be conceded that the state statute should be construed as an attempt to regulate interstate commerce, we do not think it should for that reason be held to be invalid,

> but think it should be held to be merely inoperative—in so far as it affects interstate commerce—while the federal statute remains in force."
>
> Houston v. Bright, 156 S. W., l. c. 307.

Finally, and, as we believe, conclusively, we contend that the question of the effect of the United States Grain Standards Act is not before this Court. An examination of the transcript of Record discloses that such error was not assigned in the application of plaintiff in error for the writ in this case. It was assigned as error for the first time in the brief of plaintiff in error, filed in this Court. Under the authority of Briscoe v. District of Columbia, 221 U. S. 547, the rules of this Court, the Revised Statutes of the United States, and other authorities cited in our points and authorities, the assignment of error in the brief was not sufficient, and the alleged error is not here for review.

As a matter of fact, the United States Grain Standards Act, and its effect, was never called to the attention of the State court in any manner. The question not having been presented to, or passed upon by, the State court, the judgment of that court should not be attacked upon such alleged but not assigned or urged error.

CONCLUSION.

In its return and in its brief, plaintiff in error is very insistent as to the benefits to accrue to St. Louis and vicinity by reason of the operation of plaintiff in error's Department of Weights; but we think that, perhaps, the judgment of the Legislature is entitled to more weight. At most, such insistence is foreign to the real issue in this case. Quoting again from the opinion of the Supreme Court of the State of Missouri in this case:

> "Its admissions of record shows that it is not only violating the spirit, but also the letter of the statute. Its reasons for such violation are immaterial, if the statute is a valid enactment. Much of the very lengthy return is taken up with statements of reasons for the admitted violation of the law, but if the law is a valid one, the imagined necessity of its violation in the alleged interest of the grain trade at St. Louis, is wholly immaterial, and beyond the real issues.
>
> "Many laws seemingly work hardships upon persons and their business, but this is no excuse for the violation of the law. Nor is this seeming hardship an excuse for a corporation to do things, under a charter granted by the state, which things the state has forbidden by law."
>
> Printed Trans. of Rec., pp. 18, 19. State ex inf. v. Merchants Exchange, 269 Mo. l. c. 355, 356.

Believing that the act in question is a valid exercise of the police power of the State; that it has a real and

substantial relation to the object to be accomplished; that it is neither a purely arbitrary interference with lawful business transactions, nor greatly in excess of the need; that it was not directed against commerce or any of its regulations, but relates to the rights, duties and liabilities of citizens of this State, and only indirectly and remotely affects the operation of commerce; and that it is not in violation of any provision of the Constitution of the United States, or in conflict with any Congressional act, we pray that the judgment of the Supreme Court of the State of Missouri in this case be affirmed.

Respectfully submitted,
FRANK W. McALLISTER,
Attorney-Genenal of Missouri,
JOHN T. GOSE,
Assistant Attorney-General of Missouri,
For Defendant in Error.

APPENDIX.

Some of the laws of Missouri and other states relative to the weighing and inspecting of grain and other commodities by public weighers or inspectors.

Missouri—Laws 1893, p. 182; R. S. 1899, Chap. 117, Art. III; R. S. 1909, Chap. 60, Art. II; Laws 1913, pp. 354-373; Laws 1915, p. 302.

Providing for inspection and weighing of grain and hay by public inspectors and weighers.

R. S. 1899, Chap. 117, Art. IV; R. S. 1909, Chap. 60, Art. I.

Providing for public inspection of beer, and imposing a penalty for sale without such inspection.

R. S. 1899, Chap. 117, Art. I; R. S. 1909, Chap. 60, Art. III; Laws 1913, pp. 373-378.

Providing for inspection of petroleum, by public inspector, and imposing a penalty for sale without such inspection.

Stat. 1825, pp, 452-461;
Stat. 1845, Chap. 86, Sec. 44;
Stat. 1855, Chap. 83, Sec. 47;
Laws 1871, pp. 81-84;
Stat. 1909, Chap. 60, Art. VI, Sec. 6868.

Providing for inspection of tobacco, and issuing certificates by public inspector in city of St. Louis;

and prohibiting the inspection by any-one else than the public inspector and imposing a fine therefor.

Arizona—R. S. 1913, Sec. 5536.

Making it unlawful to sell wood, except by the cord, and providing for a delivery ticket on which shall be distinctly expressed, in cords or fractional parts of cords, the amount of wood in the load, etc.

Arkansas—Kirby's Digest, 1904, Secs. 4063-4068.

Providing for inspection for oils and making it unlawful to sell any oils without same having been inspected by state inspector.

Colorado—Courtwright's Colorado Stat. Secs. 7035 7037.

Requiring all persons retailing coal, in cities of first and second class, to have same weighed on official city scales and furnish to purchaser a certificate of weight, and providing penalty for failure to do so.

Connecticut—Rev. Stat. 1902, Sec. 4887.

Making it unlawful to sell milk on Babcock tests in any other bottles than those tested and stamped by Connecticut Agricultural College and providing penalties for its violation.

Dakota (Ty)—Compiled Laws, 1887.

Providing that county commissioners should provide by resolution what kinds and quantities of goods, wares, merchandise, grain, live stock and produce may be sold with or without use of standard weights and measures, and providing penalties for its violation.

Delaware—Stat. 1852. Amended 1893. p. 544-45.

An act providing for a public inspector and measurer of lime in the town of New Castle, and making it unlawful to ship lime until same had been measured and inspected by said public inspector and measurer.

Florida—Comp. Stat. 1914. Secs. 1042-1943.

Empowering cities and towns to establish public markets, and providing that certain articles should be sold only at said markets, and also authorizing the fixing of the hours of sale, and regulating the weights of certain articles.

Sec. 1243a-1243b.

Fixing the size of orange boxes and making it unlawful to use any box of less size.

Georgia—Rev. Stat. 1911, Secs. 1844-1846.

Providing oath for weighers of cotton and rice and making it unlawful for any person other than a sworn weigher to weigh these articles, or for any one to permit them to be weighed except by a sworn weigher. Secs. 1864, 1871, 1874.

Providing for inspection of flour in certain localities and prohibiting its sale until inspected by a public inspector.

Illinois—Paragraph 1334, (54) Ill. Stat. Annot. 1911.

Empowering cities to regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay, and any other article of merchandise. (Held to empower city to appoint a weighmaster and compel all coal to be weighed by him, and that his certificate must be obtained therefor.)

Paragraph 9064 (1) 9064 (2).

Providing for the exclusive weighing of grain by state weigher in cities where there is state inspection of grain.

Indiana—Burns' Annotated Code, Sec. 10525j.

Prohibiting the sale of any article except by standard weight or measure, with exception thereto.

Iowa—Code 1907, Sec. 717.

Authorizing cities to establish markets and regulate weighing and measuring of merchandise offered for sale. (Held to authorize the passage of an ordinance requiring commodities to be weighed on city scales and providing a penalty for failure to so do. **Davis v. Anita,** 73 Iowa 325.)

Kansas—Gen. Stat. 1909, Secs. 3327-3339.

Providing for the inspection and weighing of grain by public inspectors and weighers at certain places within the state, and making it unlawful for anyone except an official inspector or weigher to inspect or weigh grain and providing a penalty theretor.

Secs. 1402, 1580.

Providing that cities of second and third classes may regulate the weighing and measuring of commodities and the places where same shall be weighed and may establish public scales and appoint a wieghmaster.

Kentucky—Stat. 1909, (Russell) Secs. 2479, 80, 81.

Providing for the inspection of oil used for illuminating purposes in coal mines, by state mine inspector, and providing a penalty upon anyone selling such oil without it having been inspected by such state mine inspector.

Sec. 2562.

Providing for the inspection and weighing of all grain at certain warehouses by public weigher and inspector.

Louisiana—Const. and Rev. Laws Louisiana (Wolff), Vol. 111, p. 924-25.

Providing for state gaugers of coal shipped in barges, and making it unlawful for any person to sell coal in barges before it has been inspected or gauged, and providing a penalty therefor.

Maine—Rev. Stat. 1871, Chap. 41, Secs. 14, 15.

Providing for a public surveyor of lumber and requiring all boards, planks, timber and joist offered for sale to be surveyed by him before delivered.

Maryland—Annotated Cod. Art. 97, Sec. 28 and Art. 72, Sec. 73.

Providing for public weighers of tomatoes and oysters.

Massachusetts—Rev. Laws 1902, Vol. 1, pages 570-571.

Providing for the wieighing of coal, coke and charcoal by public weighers and providing penalties for violation.

Pages 568-569.

Providing for the measuring of wood by a public measurer and providing penalties for violation.

Pages 564-565.

Providing for inspection of lime by public inspector and providing penalty for sale without such inspection.

Pages 562-563.

Inspectors of hay and grain.

Michigan—Howells Michigan Stat. Vol. 2, Sec. 5629 (18).

Empowering incorporated cities to regulate the inspection, weighing, and measuring of brick, lumber, fire-wood, coal, hay and any article of merchandise.

Minnesota—Gen. Stat. 1915, Secs. 4576-4588.

Providing for the weighing of hay on public hay track of Ry. Co's. by state weigher and providing a penalty upon anyone else who shall assume to act as weigher at such scales.

Mississippi—Laws 1873.

Providing for public weigher of cotton in Vicks-

burg, prohibiting the weighing of cotton by anyone else in said city. (Gaines v. Coates, 51 Miss. 335.)

Nebraska—Stat. 1913, Sec. 4098, 4428, 4604, 4840, 5128.

Empowering cities to regulate weighing and measuring of hay, wood and any other article exposed for sale, etc., and to determine place or places where such measuring or weighing is done.

New Hampshire—R. S. 1901, Chap. 129.

Surveying of all lumber by public surveyor, and providing penalties for exporting or shipping without survey.

Chap. 126, Secs. 4-11.

Providing for inspection of hay by public inspectors in certain towns by public inspector, and providing penalty for violation of ordinance.

Nevada—Rev. Laws, 1912, Sec. 794, (47-49).

Empowering cities to regulate the place and manner of sale of various articles and to provide for the measurement and graduation of any article of merchandise.

New Jersey—Compiled Stat. Vol. IV, Sec. 5847, (22-29).

Providing for standard measures for cranberries and empowering the common council of a city to provide the method by which wagons and cart loads of goods, wares, merchandise and other commodities are sold, and providing penalties for violation of such ordinances.

New Mexico—Rev. Stat. 1915, Sec. 5832.

Requiring city councils to prescribe rules for weighing commodities and to designate a place where hay and wood might be sold by persons having no fixed place of business in the city, and providing a penalty for the city council's failure to enact such ordinances.

New York—B. C. & G's. Consolidated Laws Annot. Vol. 7, (Sup.) p. 425, Sec. 5.

Fixing the size and brand of bottles in which milk is to be sold and providing a penalty upon the manufacturer for making bottles of different size and brand for sale in state of New York.

N. Carolina—Gregory's Suppl. to Pell's Revs'l., Sec. 3978a.

Providing for the inspection of illuminating oil and a penalty for its sale without such inspection.

Ohio—Page and Adams' Annot. Gen. Code, Vol. 2, Sec. 3651.

Empowering cities to regulate the weighing and measuring of hay, coal, wood and other articles exposed for sale.

Oklahoma—R. L. 1910, Vol. 1, Sec. 591.

Giving cities power to regulate weighing and measuring of every commodity sold in the city, and the weighing and inspection of hay, grain, coal, the measuring of wood and to regulate the places where same shall be sold, and the person authorized to perform the duties of weighing, inspecting, etc.

Pennsylvania—Purdon's Digest, Vol. IV, Pages 5071-5084.

Laws relative to weighing coal, bark, lime, lumber, etc.

S. Carolina—Code of 1912, Secs. 2961, 3064.

Empowering cities to require dealers and sellers of coal, coke, hay, cotton seed, etc., to be weighed by public weigher.

See Art. 2, 3, 4, 5 and 6, Chap. 34, for Stat. regulating weighing and measuring of cotton, flour, grain, liquor, pork and beef, rice, staves, lumber, etc.

Texas—Vernon & Soyles, Stat. Vol. 1, Art. 841.

Empowering cities to regulate sale of certain articles and to appoint public weighers and gaugers, and prescribe their duties and fix fees.

Art. 7838-7835. Cotton.

Virginia—Stat. 1904, Sed. 1038.

Empowering cities to provide for weighing of coal, hay, etc.

Chap. 83. Providing for public weighers and all samplers of tobacco, and requiring all tobacco in public warehouse to be sampled and weighed by them.

Washington—R. & B's. Code and Stat. 1909, Sec. 5992-5593.

Commission to have exclusive weighing of grain at places where inspector is provided, commissioner to fix fees.

Wisconsin—Stat. 1911, p. 1204, Sec. 1747-(21).

Grain received at certain mills and public warehouses shall be weighed by state weighers exclusively.

Grain and warehouse commissioner to fix fees. Sec. 1747-(22).

Rhode Island—Gen. Laws, 1909, p. 635, Secs. 21, 22.

Providing for a public weigher of coal in towns, and making it a misdemeanor for anyone to sell coal without it having been weighed by said public weigher, and to fix the fees of such weigher.